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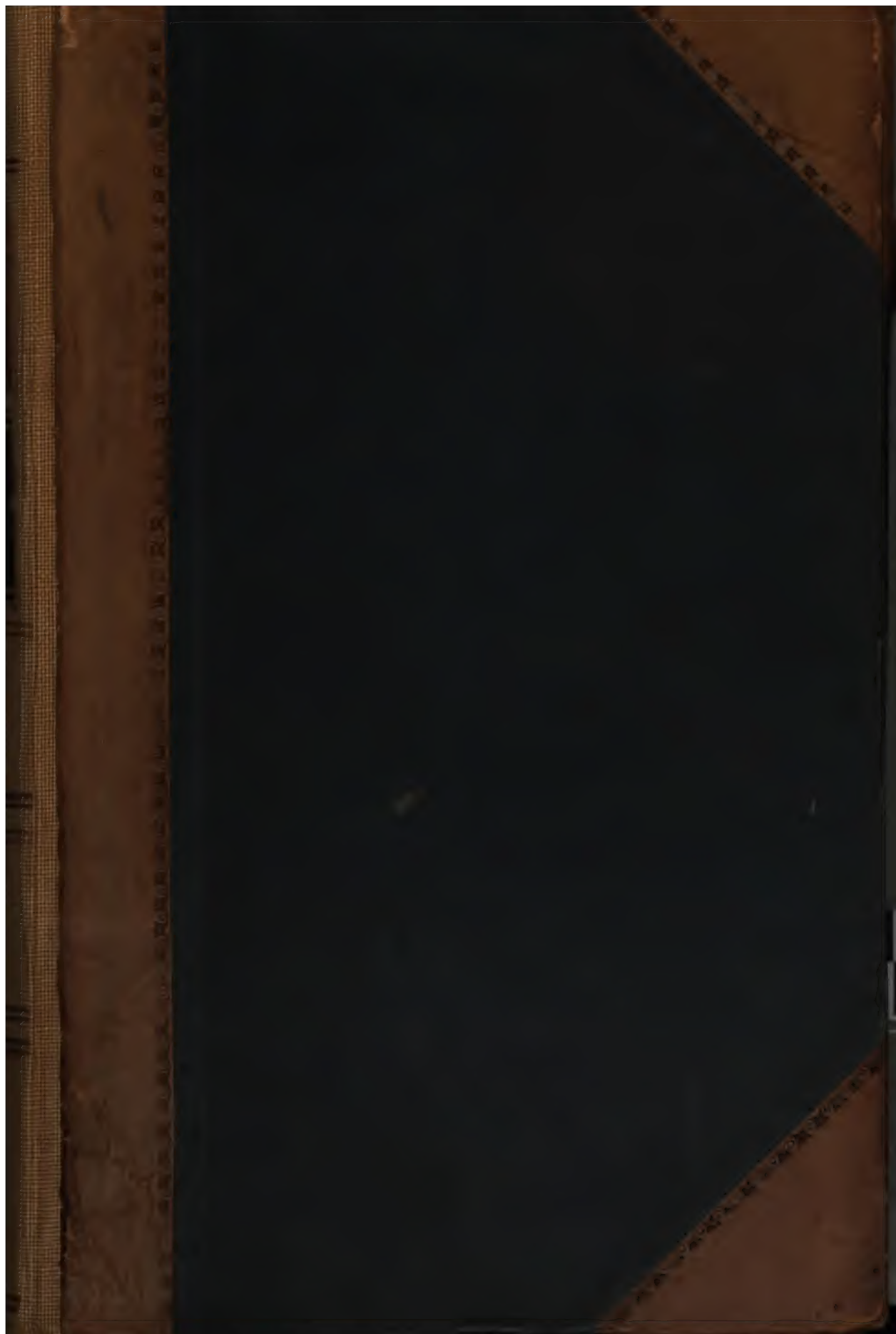
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HOUSE OF LORDS CASES

ON

APPEALS AND WRITS OF ERROR,
CLAIMS OF PEERAGE, AND DIVORCES,

DURING THE SESSIONS

1847 AND 1848.

BY

CHARLES CLARK, Esq.,

AND

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(BY APPOINTMENT OF THE HOUSE OF LORDS.)

VOL. I.

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JUDGES AND LAW OFFICERS
DURING THE PERIOD OF THE DECISIONS REPORTED IN THIS
VOLUME.

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LORD LANGDALE.

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ERRATA ET CORRIGENDA.

- Page 6, insert in the margin facing the head note, the words "*Excise Licence—Grocer—Publican—Statute.*"
- 58, line 5 from top, for "portions," read "portioners."
 - 62, — 13 from bottom, for "*Humphry*," read "*Hodgson*."
 - 149, — 1, after "*Mr. Bethell*," insert "(with whom was *Mr. Craig*.)"
 - 157, — last but one (note) for "will," read "bill."
 - 168, *et seq.*, in margin, for "*Bootle*," read "*Wilbraham*."
 - 272, in margin, delete "March 10—June 20."
 - 363, in margin, delete "*Injunction*."
 - 380, line 5 from bottom, for "dismissed," read "reversed."
 - 381, in margin, for "acceptance of," read "acceptance by."
 - 385, line 11 from bottom, for "plaintiffs in error," read "appellants."
 - 412, — 2 from bottom, for "proposition," read "proportion."
 - 424, — 9 from bottom, for "with," read "within."
 - 459, — 13 from the top, for "*Newelme*," read "*Ewelme*."
 - 462, — 9 from bottom, for "*Newelme*," read "*Ewelme* Hospital."
 - 500, — 10 from bottom, for "maariage," read "marriage."
 - 505, in note, for "Ald. & El. 540," read "Ad. & El. 540."
 - 583, in last line of note, read "on" after "present."
 - 576, line 23 of head note, for "were referred," read "was referred to."
 - 584, in margin, for "1848," read "1846."

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THE
HOUSE OF LORDS
REPORTS.

JESSY STEWART DINGWALL FORDYCE,
executrix of ARTHUR DINGWALL } *Appellant.*
FORDYCE }

1847.
February 23.
}

SIR HENRY BRIDGES, executor of J. D. }
DINGWALL } *Respondent.*

The act 4 & 5 W. IV., c. 22, for the apportionment of rents, annuities, and other periodical payments, extends to *Scotland.* *Apportionment of rent. Statute: Scotland.*

The intention of the Legislature must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute.

THIS was a suit instituted under the act 4 and 5 W. IV., c. 22, by the respondent, as executor of *J. Duff Dingwall*, deceased, to obtain, on behalf of the estate which he represented, an apportionment of the rents and profits of certain lands in *Brucklay*, of which the deceased had died seised, all of which rents and profits had been claimed and taken by Mr. *Arthur Dingwall Fordyce* as heir of entail on the death of Mr. *J. D. Dingwall*. *John Duff Dingwall* was for several years heir of entail in possession of the lands of *Brucklay*, and died on the 26th October, 1840, and consequently during the currency of a half year. The respondent, as his executor, drew the rents for the half year, ending at *Whit Sunday* 1840,

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being the term immediately preceding Mr. *Dingwall's* death. *A. D. Fordyce* drew the rents for the half year ending at *Martinmas* 1840, being the term during the currency of which the death had occurred. In *April* 1842 the respondent instituted this suit claiming under the statute an apportionment of the rents of that half year. He founded his claim on the provisions of the 4 and 5 W. IV., c. 22, by the second section of which it is enacted, that "all rent-service reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power, and which lease shall have been granted after the passing of this act, and all rents-charge, and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description in the United Kingdom of Great Britain and Ireland, made payable or coming due at fixed periods," &c., shall be apportioned so and, in such manner, that on the death of any person interested in them, his or her executors, &c., shall be entitled to a proportion of them according to the time which shall have elapsed from the last period of the payment to the day of the death, &c. Mr. *A. D. Fordyce* put in several pleas; the first of which alleged, that "the act 4 and 5 W. IV., c. 22, did not extend to *Scotland*." On this plea, Lord *Cuninghame*, the Lord Ordinary, made an order for referring the case to the judges of the First Division of the Court of Session, but appended to his order a note, in which he discussed at full length the question raised by the plea, and expressed his opinion that the act did not extend to *Scotland*. The judges of the First Division having differed in their opinions, the case was remitted for the advice of the other judges. Of these, the Lord President (*Boyle*), Lord *Moncreiff*, and Lord *Cuninghame* were of opinion that the statute did not extend to *Scotland*; all the rest held that it did; and on the 7th *March*, 1844, a final decree was pronounced to that effect. This was the decree appealed against.

Mr. *Anderson* (Sir *F. Kelly* was with him) for the appellant.—The judgment of the court below must be reversed. The statute cannot apply where the estate is *Scotch*, and where the owner of it is a domiciled *Scotchman*, and the law which governs its administration is the law of *Scotland* alone. That is the case here. The words of the act relate not to territory, but to the description of payments. There may be payments of annuities due to parties domiciled in *England* dying during the currency of a term, and leaving *English* executors or administrators, and to such cases, as the succession would then be governed by the law of *England*, the statute in question may be applied. But it does not apply to cases where the property and the domicile of the holder, being *Scotch*, the succession must be governed by the *Scotch* law.

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The Lords intimated that the question of domicile, as affecting the law of succession, did not affect this case, which was purely a question on the construction of the words of the statute.

Mr. *Anderson* continued.—There is nothing in the statute, nor in the general rules relating to the construction of statutes, which will justify the application of this act to *Scotland*. Analogy is not in favour of such an application. It is said that certain general terms in this act warrant its application to *Scotland*, but the *English* Bankrupt Act contains terms quite as general, yet it has never been held that that act extended to *Scotland*. Again the act of 4 and 5 W. IV., is an act passed to amend the 11 Geo. II., c. 19. That was a purely *English* act, it treated of every thing *English*, and it applied *English* rules to *English* matters. It was called, “An Act for the more effectually Securing the Payment of Rents, and preventing Frauds by Tenants,” and it was, therefore, perfectly clear that it was exclusively an *English* act; for the *Scotch* law did not recognize

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“tenants” in the sense in which that word was employed in that statute. Besides which, the very provisions of that statute confined its operation to *England*. The Statute 4 and 5 W. IV., c. 22, is merely “An Act to amend an Act of the 11 Geo. II., &c.” Its enactments must consequently be construed with those of the act it was passed to amend, and it must be confined to the purpose thus announced in its description. It may by possibility apply to rents which are payable in *Scotland*, but not unless they belong to or are regulated by the law of *England*. [Lord *Brougham*.—Perhaps there may be some ground for contending that this statute was not at first intended to apply to *Scotland*, but are there not words in it which directly make it applicable there?] The words are merely, “in the *United Kingdom of Great Britain and Ireland*,” but this expression seems to have been casually introduced—it is not enforced by any other expression of the intention of the Legislature, and it is contradicted by the general nature of the statute and the objects with which it deals, all of which are exclusively *English*.

Mr. *James Russell* and Mr. *Elmsley* appeared for the respondent but were not called on.

Lord *Brougham*.—I have no doubt whatever upon this case, and I do not think that we ought to call on the other side. We must construe this statute by what appears to have been the intention of the legislature. But we must ascertain that intention from the words of the statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute. The first part of this statute is general, but the things described in it may in some of them include matters that are the subjects of *Scotch* law, and then comes that extensive phrase, “in the *United Kingdom of Great*

Britain and Ireland." The words here used include, in terms and in spirit, *England, Scotland, and Ireland*. By those words we are bound, and I therefore move that the judgment of the court below be affirmed.

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The *Lord Chancellor*.—I am not able to see that any doubt can exist in this case. Whatever may have been intended by the legislature, it has used words which in express terms declare that all payments, arising from lands in "*Great Britain and Ireland*," shall be subject to the apportionment decreed by this statute. Why is not *Scotland* included in these words? I cannot see any reason for saying that it is not included. On the contrary, it seems to me that, it is expressly and inevitably included within the very words of the act.

Judgment affirmed with costs.

1847.	JOHN M'KENNA	-	-	<i>Plaintiff in error.</i>
Feb. 8;				
March 11.	GEORGE PAPE	-	-	<i>Defendant in error.</i>

The Act 6 & 7 W. IV., c. 38, s. 3, extends to prevent a person who is already a publican from obtaining a licence to carry on the business of a grocer on the same premises, as absolutely as it does to prevent a person, licensed as a grocer, from carrying on in the same premises the business of a publican.

—♦—

THIS was an action on the case. The first count of the declaration stated, that the plaintiff was a person duly licensed, pursuant to the statutes in that case made and provided, to exercise and carry on the trade and business of a retailer of spirits, to be consumed on his premises, in the county of the city of *Dublin*, and being so licensed, he became desirous to trade in and sell coffee, tea, cocoa, nuts, chocolate, and pepper, in a certain room situate in and belonging to his house then and there situate, within the *Dublin* excise district, and for that purpose he then and there duly made entry of the said room with the proper officer of excise, in whose survey the said room was situated, and was intended to be used, &c. ; that the defendant was the collector of excise for the said district, and a person employed for the purpose of granting excise licenses authorised or required to be taken out by persons carrying on any trade or business subject to the laws of excise. And the plaintiff being so licensed, as aforesaid, to retail spirits, and having made the entry of the said room, and being otherwise entitled to receive such licence as hereinafter next mentioned, applied to the defendant, as such collector, for a licence to trade in and sell coffee, &c., in the said room whereof entry had been made, &c., and then and there paid to the defendant, as such col-

lector, a certain sum of money, to wit, &c., being the amount of duty imposed upon such licence, and then and there demanded the same. And it thereupon became the duty of the defendant, as such collector, &c., so to grant and deliver such licence as aforesaid. Breach, that he refused, whereby plaintiff was hindered and prevented from engaging in the said trade, to plaintiff's damage, &c.

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The second count was similar to the first; but instead of payment of the duty for the licence, alleged a tender of it.

General demurrer and joinder.

Judgment, without argument, was given *pro formâ* for the defendant on this demurrer in the Court of Exchequer, in *Dublin*, which judgment was afterwards affirmed in the Exchequer Chamber (a). This writ of error was then brought.

Mr. *Napier* and Mr. *Peacock* for the plaintiff in error.

The plaintiff contends, that the duty of the excise officer is merely of a ministerial nature, and that consequently he is bound to perform it whenever a party puts himself into a condition lawfully to call on him to do so. The case of *Ferguson v. Kinnoull* (b) establishes that principle. Here the plaintiff had put himself into a condition lawfully to demand this licence. The refusal to grant it gave the plaintiff a right of action: he was not bound to aver malice. [Lord *Brougham*.—Misfeasance of a public officer in the discharge of his duty is sufficient to maintain an action of this sort. The malice is presumed from the illegality of the act. The question here does not turn on the pleadings, but on the construction of the excise statutes (c).]

(a) 7 Ir. Law Rep., 98.

(b) 9 Clark & Finnelly, 251.

(c) The statute 6 & 7 W. IV., c. 38, s. 3, enacts, "That from and after the passing of this act, no person in *Ireland*, who shall

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The defendant rests his answer to this action on the construction of certain provisions in the excise acts. He does not deny the plaintiff's general right to the licence, but contends that, under the circumstances of this case, that right is taken away. This argument cannot be successfully maintained. An established right cannot be taken away by mere implication; and it is not pretended that the grant of the licence here is in terms forbidden by any statute. It is said that the two trades of grocer and publican cannot, by the provision of the *Irish* excise acts, be carried on at the same time by the same person, unless the houses in which they are carried on are at a certain distance from each other. But it is clearly settled, by the case of *The Taylors of Ipswich (d)*, that, by the common law, a man may carry on as many trades as he pleases; and this right cannot be taken away from him, except by positive prohibitory provisions in a statute. There are no such provisions here.

The error in this case has arisen from confounding the grocer's with the publican's licence. They are in reality distinct. The publican's licence must be applied for to the magistrates, who may grant or refuse it at their dis-

be duly licensed, under any act or acts for granting excise licenses, to deal in or sell tea, coffee, cocoa, nuts, chocolate, or pepper, nor any person deemed a grocer within the meaning of the laws of the excise in force in *Ireland*, at or immediately before the passing of this act, shall be entitled to take out any licence to retail spirits in the house or on the premises of such retailer, or in any house or on any premises within one quarter of a mile of the house or premises of such retailer, other than a licence to retail spirits in quantities not less, at one time, than one pint, and to be consumed elsewhere than in the house, or on the premises of such retailer; and any licence to retail spirits in any other manner, granted after the passing of this act to any such grocer, or person so licensed as aforesaid, shall be wholly null and void to all intents and purposes whatsoever."

(d) 11 Co. Rep. fol. 53, a, Thomas & Fraser's ed. p. 101.

cretion; and who, after it has been granted, may withdraw or annul it. The holding of it places the party under the superintendence of the police. The grocer's licence is altogether different. A party is entitled to it on performing certain preliminary conditions; he need not go before the magistrates to ask for it; and they have no controul over him when he has obtained it. The holding of it does not subject him to the interference of the police. [Lord *Brougham*.—But may not the excise officers enter a grocer's premises, and see whether he is selling tobacco and coffee that have properly paid custom duty?] [*The Attorney General*.—He may.] But that matter does not affect this question; for the contention here is founded on the presumption that the two licences are the same in their nature, and subject a party to the same supervision, and that the fact of being a publican disqualifies a man from being a grocer. There are no words expressly declaring such a disqualification to be found in any of the statutes. The 45 Geo. III., c. 50, s. 19, declares what persons shall not have a spirit licence, and among these persons a jailer and a grocer are mentioned; and any licence issued to any such person is declared to be void. The 61st section of that act gave the magistrates the power of annulling a publican's licence when a grocer's licence has been granted to the same individual; so that, if a man first got a public-house licence, and afterwards become a grocer, his publican's licence could be avoided. But that act was repealed by the 46 Geo. III., c. 70, and a grocer then became capable of taking a retail spirit licence. The latter act was in its turn repealed by the 47 Geo. III., sess. 2, c. 12, and the first statute would consequently have revived, but that the matters to which it had related were, in this last statute itself, made the subject of special legislative provision. By the 14th section of the 47 Geo. III., the grocer was empowered, as a matter of right, to take out a licence to sell spirits, in not less than two quarts, and not to be

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consumed on the premises. Then came the 53 Geo. III., c. 137, by the 4th section of which it was enacted, that when any such licence was required by a grocer, it should be lawful for the party desiring it to apply to the officers of excise, who "shall grant the same." The 55 Geo. III., c. 19, transferred the management of the duties from the Office of Stamps to that of the Excise; it consolidated all the previous acts, but it left the grocers as they were. The 39th section of this act stated what trades should not be allowed to obtain a publican's licence, and concluded with the words "other than a grocer capable by law of receiving such licence," so that by that act the grocer's right to receive such a licence was recognized. The 58 Geo. III., c. 57, recites the 45, 47, and 53 Geo. III., and repeals all that relates to grocers in those acts. The grocer is, by this act, restored to the privileges he had before the passing of any of them, and, as he may sell spirits by retail, and in any quantity less than two quarts, he obtains a new statutory privilege instead of that which he had under the 14th section of the 47 Geo. III. Two quarts were therefore the *maximum* but not the *minimum* of what he could sell. Then comes the 59 Geo. III., c. 106, which repeals the 39th section of the 55 Geo. III. and by the 6th section of which (after referring to the 33rd section of that statute), it is provided, that a person exercising certain trades shall not be capable of receiving a spirit licence, and any licence issued to a person so declared not capable of receiving it, shall be void. That provides in express terms for the case where a man gets a licence and then enters into a forbidden trade; his licence is then to be void. That shows that it was necessary to have an express enactment in order to produce that result. There is no such enactment here.

The 6 Geo. IV., c. 81, an act of the United Kingdom, declares, that all persons licensed under that act to deal in coffee, shall be deemed grocers, and entitled to take out a licence to sell spirits in any quantity not exceeding two

quarts, to be consumed elsewhere than on the premises ; but such persons could not obtain an excise licence to sell spirits to be consumed on the premises without first getting a magistrate's certificate for that purpose ; and if he obtained a licence without such certificate, the licence was declared void, and the party was subjected to a penalty. Such a person was therefore in a different situation from a grocer who had a right to a licence to sell less than two quarts, though not to be consumed upon the premises. The legislature found that it was an evil for grocers to sell spirits in their shops in less quantities than a pint, which, under the terms of the previous acts, might be done, and the 6 & 7 Wm. IV. was passed to put an end to that evil. That was the whole object of that act ; and its effect merely is to alter the nature of the licence, and to put the party under certain restrictions. The 6 G. IV., c. 81, shows clearly that it was not the intention of the legislature to prevent a publican from having a grocer's, or a grocer from having a publican's licence. That act, in its schedule of duties, imposes a duty of 11s. on every licence to sell coffee, tea, cocoa, nuts, or pepper. It then goes on to say, that "every retailer of spirits (except retailers of spirits in *Ireland*, after mentioned) shall" pay a certain duty ; and "every retailer of spirits in *Ireland*, being duly licensed to trade in, vend, and sell coffee, tea, cocoa, nuts, chocolate, or pepper, and not selling spirits in any greater quantity at one time than two quarts, or any spirits to be consumed on the premises, "shall, at a rent of 25*l.*, pay a duty of 9*l.* 9*s.*" That part of the act clearly contemplates the case of a grocer or person selling tea and coffee, likewise selling spirits to be consumed on his premises. Now, he can only sell spirits in that way by virtue of a public-house licence ; and the act therefore contemplates the union of a publican's and a grocer's licence in the same individual. The act of 6 and 7 Wm. IV., c. 38, must be read in conjunction with that statute, and cannot be construed as having any other meaning than

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that of merely altering the quantities previously allowed to be sold. By both these statutes the party is prevented from selling more than two quarts, or less than one pint, on the premises where he carries on the business of a dealer. This view of the statute is confirmed by the case of *Dickson v. Pape* (e), where it was held, that the higher duty imposed on grocers taking out spirit licences, by the schedule to the 6 Geo. IV., c. 81, s. 2, is not the duty chargeable on the licence specified in the 6 and 7 Wm. IV., c. 38, s. 3. The two acts must be read together; and the result of them is, not that the two trades cannot be carried on together, but that the mode of dealing in one trade is altered. This view of the matter is confirmed by the 3 and 4 Wm. IV., c. 68, which, by the 13th section, describes the persons not capable of holding a licence to sell spirits by retail, but does not mention grocers. It is therefore clear, that a person holding such a licence may afterwards obtain a grocer's licence.

Should the House, however, be of a different opinion, then it is submitted, that, in the event of a man holding the two licences, the publican's and not the grocer's licence might be, by the grant of the grocer's licence, avoided; but the holding of a publican's licence will not authorise the refusal of the grant of a grocer's licence. That the avoiding the publican's licence might be the result of the grant of the grocer's licence can make no difference in the duty of the officer. If the party was, as it is submitted he was, entitled to demand the grocer's licence, the officer ought to have granted it without reference to the consequences. The refusal to grant it is a good cause of action, and this judgment must be reversed.

The *Attorney-General* (Sir J. Jervis) and Mr. James Wilde, for the defendant in error. The single question here is, whether the plaintiff can hold the publican's and

the grocer's licence together. It is contended here, that it was the officer's duty to grant the grocer's licence, though the publican's licence might thereby become void. That assumes, that the party may receive the two together. But the form of the declaration disposes of that; for the declaration alleges, that the plaintiff was licensed to sell spirits by retail, and, being so licensed, he became and was desirous to sell tea and coffee, and for that purpose made an entry, &c. If the officer had granted him a licence under the circumstances here alleged, the licence would, so granted, have been void, and the party receiving it, and selling under it, would have been subjected to a penalty. Can it be said that it was the duty of the officer to do that, by the doing of which he would have subjected the party to a penalty. This statement, alone, puts an end to the pretence of a duty on the part of the officer to grant the licence; for the law will not allow a party to do indirectly what it directly forbids to be done; nor will it require him to do that which, under a liability to a penalty, is forbidden to be done. The law prevents a party from taking a grocer's licence and then getting a publican's licence, and yet the contention here is, that he may have a publican's licence and then have a right to demand the grant of a grocer's licence. This would be to effect indirectly, what the law will not allow him to do directly. The spirit of the prohibition equally extends to both cases.

There is no distinction between a publican's licence and an excise licence. The magistrates grant the one; and then they grant a certificate on which, and on which alone, the other can issue. The case of *Dickson v. Pape* is not in point. The question now before the House did not arise then. But, in *The Queen* on the prosecution of *Boland v. The Commissioners of Excise* (f), it did arise; and there the Court of Queen's Bench in *Ireland* dis-

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(f) 2 Jebb & Symes, 243.

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tinctly held, that the effect of the 6 & 7 Wm. IV., c. 38, s. 3, is, that a licensed publican is not entitled to a grocer's licence for the sale of tea and coffee, upon the same premises.

A reference to the statutes passed on this subject, will show that the intention of the legislature was to prevent a grocer selling spirits in small quantities, to be consumed on the premises. The 31 Geo. III., c. 13, s. 3, enacts, "that no licence shall be granted to any person for selling, by retail, any spirituous liquors in *Dublin*, except to such persons as shall keep victualling houses, inns, and use and exercise no other trade whatever; and any licence granted to any other person shall be null and void." The 32 Geo. III., c. 19, s. 3, contains the same provisions, with this addition, "that any licence which shall be granted to any person exercising the trade or business of a grocer, or in whose house the trade or business of a grocer shall be carried on, shall be null and void, and such person shall be subject to the penalties,"—penalties granted by that act against retailers of spirits without license. The 36 Geo. III., c. 40, contains similar provisions, and gives a legislative definition of the term "retailer." These were all *Irish* acts. Those which were passed after the Union proceeded in the same spirit.

The 58 Geo. III., c. 57, permits a grocer to sell spirits in certain quantities only. It may be admitted that the 6 Geo. IV., c. 81, declares that certain persons shall have no licences whatever, but that does not show that, under the provisions of that statute, all the persons besides those who are thus totally excluded may have a licence; for the 26th section of that act provides that if any person shall deal in spirits by retail, or carry on any trade for which a licence is required by that act, without first obtaining such licence, he shall be liable to penalties. It is plain, on a review of all the statutes, that a grocer is not entitled to hold at the same time a publican's and a grocer's

licence; and the statute now particularly under consideration expressly says that a grocer shall not sell less than one pint, which shall not be consumed on the premises. It is impossible that such a person should ever be held entitled to a publican's licence.

The 6 Geo. IV., c. 81, imposes two different penalties, one on a person who retails spirits, and is not a grocer, and another on such a person being at the same time a grocer. The retail spirit licence is a two guinea licence; it has nothing to do with the restriction of the liquor being consumed on the premises, but it is subject to the restriction of not selling more than two gallons at a time. But the grocer's retail spirit licence costs nine guineas, and prevents the party from selling more than two quarts at a time. If both conveyed the same rights, it is impossible to suppose that any man would give nine guineas for what he might get with fewer restrictions at the price of two guineas. The 6 and 7 W. IV. is more than a mere alteration in the extent of the right of sale. If there could be any doubt upon its construction, its general purpose, and the special words used in it ought to determine that point. The rule as to the construction of statutes to be followed here was stated in this house by Lord Chief Justice *Tindal* in the *Sussex Peerage Case* (g). The intention of the legislature is to be the guide. The intention of the statute here was to prevent the two trades of grocer and publican from being exercised together, and the words of the act are sufficient to effect that purpose.

Mr. *Napier* in reply.—The case of *The Queen* on the prosecution of *Boland v. The Commissioners of Excise*, is not in point, for that was an application for a *mandamus*, which might be refused on many grounds besides that of the bare legal rights of the parties. The plaintiff

(g) 11 Clark & Finnelly, 143; see also *Fordyce v. Bridges*, ante 1.

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here is not affected by the 6 Geo. IV., c. 81, nor by the 6 and 7 W. IV., c. 38, for he is not a grocer seeking to obtain a publican's licence, and it is that circumstance alone which can bring him within the provisions of that statute. He is like any other individual seeking to obtain a grocer's licence, and he is entitled to have it on performing the requisitions of the statute. He has performed them, and the refusal to grant him the licence is a breach of duty for which the defendant is answerable in this action.

11th March. *The Lord Chancellor.*—This is a case which came from *Ireland* upon a writ of error, having been first decided in the Court of Exchequer in *Ireland*, then in the Court of Exchequer Chamber. The question is, whether the action which was brought can be maintained against a public officer for having refused to give the party a grocer's licence to sell tea and coffee, he having previously got a publican's licence.

This case turns entirely, in my view of it, upon one clause in the act of Parliament which provides. [His Lordship read the third section (*h*).] So that the enactment is beyond all dispute, that a party being a grocer shall not obtain a licence to sell spirits, except a limited licence to sell spirits above a certain quantity, and a provision as to the place where they are to be consumed.

The plaintiff in error here is not a grocer applying for a spirit licence, but he is a publican with a spirit licence applying for a grocer's licence; and the argument comes to this, that if he obtains a grocer's licence first he cannot under the act afterwards obtain a publican's licence; but that if he obtains a publican's licence first, he may then become a grocer. Now that seems to be such an absurdity, upon the face of it, that it does not appear to me

(*h*) See *ante*, p. 7.

to require more than the actual statement of it for its complete refutation. The question is, whether this part of the enactment does not make it impossible for any one person to hold the two licences together, except the limited licence, which is permitted by the act of Parliament? The plaintiff here, or any other person, could, if the argument is right, in case of his obtaining a grocer's licence first, hold both licences together, contrary to the express term of the enactment which I have referred to; and contrary, as it seems to me, to the obvious meaning of the legislature. I think that this cannot be done, and I am, therefore, of opinion that the judgment of the Court below is right and ought to be affirmed.

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Lord Brougham.—I entirely agree with my noble and learned friend. When this case was first brought before us in the argument at the bar here (and it was argued with great fulness and great acuteness), I thought there was a difficulty in it arising from the officer exercising a power which he had not, to refuse the licence; but it is clear what the object of the legislature was, and that object no doubt was, as I then threw out, revenue, namely, to get the price of the licence; but there is, indirectly also, another object, and a very important one, to check contraband dealings. I am clearly of opinion that the judgment of the Court below ought to be affirmed.

It is a great pity that this poor man was advised to carry the case so far, because really it was of no use to him to bring this writ of error. It would have been better to submit to the decision of the Court below.

The judgment of the Court below was affirmed, and the writ of error was dismissed with costs.

CASES IN THE HOUSE OF LORDS.

7. CHARLES BARRETT and another, on behalf }
6, 18. of the *Durham County Coal Company* } *Appellants.*

THE STOCKTON AND DARLINGTON RAIL- }
WAY COMPANY - - - } *Respondents.*

*Acts, A decree giving effect to allegations read from an answer, not
tion. proved nor admitted, is varied in that respect, and an inquiry
on the subject is directed before the Master.*

*nts rest. Monies paid for the use of a railway, under protest as overcharges,
were afterwards paid into Court under an order made by con-
sent, and vested in the public stocks, to abide final judgment in
an action brought to try the legality of the charges, which the
judgment declared to be illegal:—*

*Held, that the party who paid the monies was entitled to the
stocks and dividends and accumulations thereof.*

*After the judgment at law finding payments, made to the railway
company, to be overcharges, a bill filed, pending a writ of
error on that judgment, to restrain the company from con-
tinuing the overcharges, and for an account, &c., is not im-
proper nor premature, and the plaintiffs are entitled to the costs.*



By the 62d section of the act 2 Geo. IV., c. 44, which incor-
porated “the *Stockton and Darlington Railway Company*,”
for making and maintaining a railway from the river Tees
at *Stockton*, to *Witton Park Colliery*, with several branches
therefrom, all in the county of *Durham*, the said company
was empowered to demand, recover, and receive for the
tonnage of all goods which should be carried upon the said
railways, the tolls therein mentioned, viz., for all coal,
such sum as the said company should from time to time
appoint, not exceeding 4*d.* per ton per mile: for all the
articles for which a tonnage was thereinbefore directed to

be paid, which should pass the inclined planes upon the said railways, such sum as the company should appoint, not exceeding 1s. per ton; and for all coal which should be shipped on board of any vessel in the port of *Stockton-upon-Tees*, for the purpose of exportation, such sum as the said company should appoint, not exceeding $\frac{1}{2}$ d. per ton per mile. The 66th section empowered the company to make regulations as to the mode in which the tolls should be paid, and authorized the persons appointed to receive the same, in default of payment, to seize the goods in respect whereof such tolls ought to have been paid, and the waggons or other carriages laden therewith, and to detain the same until such payment should be made, and if not redeemed within five days, the same were to be appraised and sold, as in cases of distress for rent, under the authority of this and additional acts of Parliament, subsequently passed, but which are not material to this appeal. The company, prior to the year 1826, constructed "the *Stockton and Darlington Railway*," and branches therefrom, and, among others, a branch to *Middlesborough*, in the port of *Stockton-upon-Tees*; and they also constructed, among other inclined planes, one called the *Brusselton Inclined Plane*.

In the year 1828, another company, called "the *Clarence Railway Company*," obtained an act (9 Geo. IV., c. 61), to enable them to make and maintain a railway from the river *Tees*, near *Huverton Hill*, to a place called *Sim Pasture Farm*, in the parish of *Heighington*, all in the county of *Durham*, with branches. The powers of this company were afterwards altered and enlarged by five acts, which are not material to the appeal. This company, under the authority of these acts, subsequently to the construction of "the *Stockton and Darlington Railway*," and prior to the year 1836, constructed the railway called "the *Clarence Railway*," which joins "the *Stock-*

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ton and Darlington Railway," at Sim Pasture, and extends thence to Haverton Hill, and thence, by a branch, to a place called Port Clarence, on the north bank of the river Tees, within the port of Stockton-upon-Tees, and nearly opposite Middlesborough.

In May 1836, the appellants formed "the Durham County Coal Company," for the purpose of purchasing or taking collieries and coal mines, and working the same, and selling the produce. This company commenced business the 1st of July, 1836, and had an office at *Darlington*, where the business was conducted.

During the month of July 1836, the coal company sent from their collieries, for the purpose of being shipped, several waggons of coal, which were carried along the *Stockton and Darlington Railway* to and over the *Brusselton Inclined Plane*, and thence along the same railway to its junction with the *Clarence Railway* at *Sim Pasture*, and thence along the *Clarence Railway* and its branches to *Port Clarence*, where such coal was shipped on board of vessels lying there, within the port of *Stockton-upon-Tees*, for the port of *London*, for consumption there. In the same month the coal company also sent from the same collieries, for the purpose of being shipped, other waggons of coal, which were carried along the *Stockton and Darlington Railway* to and over the *Brusselton Inclined Plane*, and thence along the *Stockton and Darlington Railway*, and the *Middlesborough* branch thereof, to *Middlesborough*, where such coal was shipped on board vessels lying there, for the port of *London*, for consumption there. During this period the *Stockton and Darlington Railway Company* had a toll-house on their railway, near its junction with the *Clarence Railway* at *Sim Pasture*, and the several waggons of coal sent by the coal company, were weighed at this toll-house by an agent of the railway company, and the servant of the coal

company, who had the charge of the coal waggons, delivered to the said agent tickets, setting forth the numbers of the waggons, the weight and description of coal in each, and its destination ; and these tickets stated, as to the waggon loads of coal which were sent along the *Clarence* Railway, that they were intended for export.

In *August* 1836, the *Stockton and Darlington* Railway Company, according to their practice, caused to be delivered at the coal company's office an account of the charges of the railway company, for tolls, tonnage, and other dues in respect of the several waggon loads of coal, sent by the coal company, during the previous month, to *Port Clarence* and *Middlesborough* respectively. Those charges amounted to the sum of 532*l.* 13*s.* 11*d.*, from which deduction of 59*l.* 11*s.* 3*d.* was made by the railway company for discount and allowances, thereby reducing the demand to 473*l.* 2*s.* 8*d.* The account contained a charge of 2*d.* per ton per mile upon all the coal sent during the said month, by the coal company, to *Port Clarence*, and there shipped for *London* ; and a charge of 6*d.* per ton for the passage over the *Brusselton* Inclined Plane, of all the last mentioned coal, and also of all the coal sent, during the same month, by the coal company to *Middlesborough*, and there shipped for *London*. The coal company were dissatisfied with this account, conceiving that the railway company were not entitled to charge more than the export rate of $\frac{1}{2}$ *d.* per ton per mile on the coal sent to *Port Clarence*, and there shipped for *London*, that being, moreover, the tonnage rate charged by the railway company on the coal sent to *Middlesborough*, and shipped there for *London* ; conceiving also that the railway company were not entitled to charge any rate at all for passing over the *Brusselton* Inclined Plane, upon the coal shipped for *London*, either at *Middlesborough* or at *Port Clarence*. The coal company

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1847. claimed, in respect of these two charges, deductions of 161*l.* 10*s.* 6*d.* for the first, and of 116*l.* 12*s.* for the second, to be made from the said sum of 473*l.* 2*s.* 8*d.* Communications on the subject between the agents of the respective companies, resulted in an agreement, that the coal company should pay the said account, and all future accounts containing charges after the same rates, without prejudice to their right to recover back from the railway company such sums as should appear to have been overpaid beyond the amount authorized by their acts of Parliament, until the decision of a Court of law could be obtained on the construction of the Acts, in an action to be brought by the appellant *Barrett* against the railway company, for the purpose of trying their right to make the charges complained of.

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The coal company continued to send coal for exportation along the *Stockton and Darlington* Railway to *Sim Pasture*, and thence along the *Clarence* Railway to *Port Clarence*, where it was shipped for *London* and other ports; and the *Stockton and Darlington* Railway Company continued to send in their monthly accounts to the coal company, charging them up to the end of *December* 1840, with a tonnage rate of 2½*d.* per ton per mile; and from that time with a tonnage rate of 1½*d.* per ton per mile, upon all the coal so shipped at *Port Clarence*, and the coal company paid the full amount of such accounts, under protest, in accordance with the said agreement.

The proposed action was brought in 1837, in the Court of Common Pleas, to recover back the overcharges made by the railway company, and paid by the coal company, upon coal sent by the *Clarence* Railway, from the 1st of *July* to the 1st of *November*, 1836; and on a special verdict returned by the jury two questions were raised—viz., 1st, whether the coals carried along the *Stockton and Darlington* Railway to *Sim Pasture*, and thence

along the *Clarence* Railway to *Port Clarence*, and thence shipped for *London*, were liable to the higher duty per ton per mile, as claimed by the railway company, or only to the duty of $\frac{1}{2}d.$ per ton per mile: 2dly, admitting that the said coals were shipped for the purpose of exportation, within the meaning of the *Stockton and Darlington* Railway Acts, whether such coals were liable to pay the inclined plane duty of $6d.$ per ton for carriage over the *Brus-selton* Inclined Plane, in addition to the other railway dues.

The Court of Common Pleas, after hearing those questions argued in *November* 1840, held that, according to the just construction of the 62d section of the act 2 Geo. IV., c. 44, the coals in question must be considered as shipped for exportation, and as liable to the lower duty (of $\frac{1}{2}d.$); but that all coals, including coals intended for exportation, were liable to pay duty for passing over the inclined plane, and that for any excess of duties taken by the defendants, the plaintiff was entitled to judgment (a).

Judgment was accordingly entered up for *Barrett*, for 705*l.* 8*s.* 4*d.*, in respect of over payments made by the coal company to the railway company, from the 1st of *July* to 1st of *November*, 1836. That judgment was affirmed in the Exchequer Chamber upon writ of error, brought there by the railway company, and also affirmed by this House, in 1844, upon a like writ (b).

In 1841, pending the proceedings on the writ of error in the Exchequer Chamber, the bill in this cause was filed, and, after stating the matters hereinbefore mentioned, it charged, among other things, that the judgment of the Court of Common Pleas was a final judgment within the meaning of the agreement entered into between the parties; that the defendants pretended that the mileage rates of $2\frac{1}{2}d.$ and $1\frac{1}{2}d.$ per ton, which had been charged by them in their monthly accounts with the coal company since the

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(a) 2 Manning & Gr. 134.

(b) 11 Clark & Fin. 590.

1847. *1st of November, 1836*, included some charge for haulage, and was not entirely a tonnage rate; that the railway company were not authorized by any of their Acts to make any charge for haulage, or for anything in the nature of haulage, save the inclined plane rate for the use of the stationary engines; that they were only entitled to charge for haulage as a matter of private contract, in cases where haulage had been contracted for, and had been performed, and that they had never done any haulage for the coal company since the *1st of November, 1836*. The bill prayed for an account of all sums of money, which, since the last mentioned date, had been received by the railway company or their agents, from the coal company or their agents, in respect of the excess of the aforesaid rates of $2\frac{1}{4}d.$ and $1\frac{1}{4}d.$ per ton per mile, charged by the railway company, upon coal which, since the said date, had been sent by the coal company along the said railway to *Port Clarence*, for the purpose of being shipped there, and exported to the port of *London*, or elsewhere, above the export tonnage rate of $\frac{1}{2}d.$ per mile; and that the railway company might be ordered to pay to the coal company what, upon taking such account, should appear to be the amount of such over payments, with interest thereon, after the rate of $4l.$ per cent. per annum; or that the railway company should pay such amount and interest into Court, to be invested in $3l.$ per cent. Bank Annuities until the writ of error in the action should be decided. The bill also prayed for an injunction to restrain the railway company from exacting a higher rate than $\frac{1}{2}d.$ per ton per mile on coal sent to *Port Clarence* for exportation, or that a receiver of the excess of the charges made above that rate might be appointed, and the same be paid into Court and invested in the said stock.

The respondents in their answer to the bill, admitted that they had charged and had been paid by the coal company, under protest, the rate of $2\frac{1}{4}d.$ per ton per mile

from the 1st of *November*, 1836, to the end of *December* 1840, and the rate of $1\frac{1}{4}d.$ from the latter date, upon the coal stated in the bill to have been shipped at Port *Clarence* for exportation; but they alleged that the $2\frac{1}{4}d.$ was not exclusively a tonnage rate, but that it included a charge of $\frac{1}{2}d.$ per ton per mile for services rendered by the railway company in the transit of the coal, which was matter of private arrangement between the railway company and the coal owners, and that the actual tonnage rate, during the period that $2\frac{1}{4}d.$ had been charged, was only $1\frac{1}{4}d.$ per ton per mile, and that after the end of *December* 1840, the charge for haulage and other conveniences was made a distinct charge. And the respondents in their answer submitted to the judgment of the Court, "whether it is or is not the fact, that the said railway company are not authorized by any of their Acts to make any charge for hauling, save the said inclined plane rate for the use of the stationary engines; or whether it is or is not the fact, that they are only entitled to charge for haulage as a matter of private contract, and in cases when haulage has been contracted for and performed by the railway company." They also insisted that a final decision upon the construction of their acts of Parliament had not been obtained, and stated their intention of appealing to this House in case the judgment of the Court of Common Pleas in the action should be affirmed in the Exchequer Chamber.

In *March* 1842, after the judgment of the Court of Common Pleas in the action was affirmed in the Exchequer Chamber, upon a renewed motion before the Vice-Chancellor of *England*, for an injunction as prayed for by the bill, an order was made by consent, and without prejudice to any question in the cause, that a sum of 141*l.* 0*s.* 9*d.*, then standing in the *Darlington* District Bank, in the names of two persons, on behalf of the appellants and respondents respectively, should, with the interest of 1*l.* 2*s.* 6*d.* allowed thereon, be paid into Court to the credit of the cause;

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and that the respondents should pay into Court the sum of 4000*l.* on account of the overpayments made by the appellants, according to the judgment in the action, without prejudice to the amount of the over payments. The two sums of 142*l.* 3*s.* 3*d.* and 4000*l.* were, in pursuance of the said order, paid into Court in *April* 1842, and were laid out in the purchase of 4539*l.* 7*s.* 1*d.*, three per cent. Bank Annuities.

The cause was part-heard by the Vice Chancellor in *December* 1842, when his Honour (by consent) ordered the respondents to pay a further sum of 3597*l.* 16*s.* into Court to the credit of the cause, on account of overpayments made to them by the coal company, according to the judgment in the action, without prejudice, &c.; such sum when paid in to be invested in the purchase of 3*l.* per cent. Bank Annuities; and the Court continued the order of *March* 1842, by which the railway company were directed to deliver their usual monthly accounts of mileage rates and inclined plane rates to the coal company; and the coal company to pay into the *Darlington* district bank, in the names of trustees, the amount of the difference between the sum charged in such accounts for mileage rate, and the sum chargeable for mileage rate after the rate of $\frac{1}{2}$ *d.* per ton per mile, for all coal which should be sent by the coal company along the railway, or the branches thereof, for the purpose of being shipped at and exported from *Port Clarence* or elsewhere, within the port of *Stockton-upon-Tees*, to the port of *London*, or elsewhere. And the coal company were ordered to pay the balance of such account to the *Stockton and Darlington* Railway Company, who, while such payments should be continued, were ordered to give to the coal company the use of their railway and inclined plane, and the steam engine thereat, for the carriage of such coals; and the sums so ordered to be paid into Court to the credit of the cause were ordered to be invested in the usual manner.

In *November* 1844, after the judgment in the action

was affirmed in this House, the appellants presented a petition to the Lord Chancellor in the cause in equity, stating, among other matters, that there was then standing in the name of the Accountant General, in trust and to the credit of the cause, 8525*l.* 19*s.* 11*d.*, three per cent. Bank Annuities, and 124*l.* 3*s.* 3*d.* cash, which had arisen from the investment of the sums of money paid into Court and the dividends thereof, and submitting that the said sums of 141*l.* 0*s.* 9*d.*, and 4000*l.* and 3597*l.* 16*s.*, paid in as aforesaid, ought, in the taking of the accounts of over-payments between the coal company and the railway company, to be treated and allowed to the railway company as payments at the times when the same were respectively paid into Court towards repayment to the coal company of the amount of tolls, which, according to the judgment in the action, had been overpaid to the railway company; and that the coal company were entitled to the stock which had arisen from the investment of the said sums, and to all the accumulations and dividends thereof. The petition then prayed that the said sums of 8525*l.* 19*s.* 11*d.*, three per cent. Bank Annuities, and 124*l.* 3*s.* 3*d.* cash, might be ordered to be paid to persons named as trustees of the coal company, on behalf of the coal company; and that in taking the accounts of the over-payments made by the coal company, the railway company might be credited with the said sums of 141*l.* 0*s.* 9*d.* cash, 4000*l.* cash, and 3597*l.* 16*s.* paid by them into Court, as payments on account, at the respective times when the same were so paid.

The cause and the petition came on to be heard together before the Vice Chancellor, who made a decree therein, dated *January* 1845, whereby it was declared, that in respect of all coals which, since the 1st of *November*, 1836, had been sent by the coal company along the *Stockton* and *Darlington* Railway to *Sim Pasture*, and thence along the *Clarence* Railway to *Port Clarence*, for the purpose of

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being shipped at, and exported from, and which had been shipped at and exported from, *Port Clarence* or elsewhere within the port of *Stockton-upon-Tees*, the coal company were entitled to receive back from the railway company the amount of $1\frac{1}{4}d.$ per ton per mile out of the rate of $2\frac{1}{4}d.$ per ton per mile, paid by the coal company to the railway company, from the 1st of *November*, 1836, up to the 31st of *December*, 1840, inclusive; and the amount of $\frac{1}{2}d.$ and $\frac{1}{4}$ ths of a penny per ton per mile out of $1\frac{1}{4}d.$ per ton per mile paid by the coal company to the railway company, from the 31st of *December*, 1840, up to the 1st of *July*, 1841; from which day the said rate of $\frac{1}{2}d.$ and $\frac{1}{4}$ ths of a penny had been paid into the *Darlington* District Bank: And that the coal company were also entitled to receive back the sum of 141*l.* 0*s.* 9*d.*, the amount paid into said Bank in respect of the said rate of $\frac{1}{2}d.$ and $\frac{1}{4}$ ths of a penny per ton per mile, and paid into Court in *April* 1842: And it was referred to the Taxing Master to tax the defendants their costs of the suit and of the petition, to be paid by the plaintiffs: And the plaintiffs and defendants by their counsel agreeing that the sum of 7532*l.* 13*s.* 7*d.* was the amount to be received back by the coal company in respect of their over-payments, upon the footing of the aforesaid declaration, including the 141*l.* 0*s.* 9*d.*, it was ordered that the amount of the costs of the defendants when taxed should be set off against the said sum; and that the 8535*l.* 19*s.* 11*d.* three per cent. Bank Annuities, standing in the name of the Accountant General, should be sold, and out of the proceeds, and the sum of 372*l.* 9*s.* 9*d.* cash in the Bank to the credit of the cause, it was ordered that the balance of the said sum of 7532*l.* 13*s.* 7*d.*, after deducting therefrom the taxed costs of the defendants, should be paid to the trustees of the coal company: And it was ordered that the residue of the proceeds of said sale and of said cash, after such payments as aforesaid, should be paid to the treasurer of the railway company.

Barrett and Stokes, plaintiffs in the cause, representing the coal company, appealed against that decree.

Mr. Stuart and Mr. Faber for the appellants.

The first objection to the decree is, that it assumes that the respondents are entitled to charge the appellants on coals sent for export, not only $\frac{1}{2}d.$ per ton per mile, which has been thrice decided to be the legal parliamentary rate, but also $\frac{1}{2}d.$ per ton per mile for haulage, the right to which, as a charge authorized by the acts of Parliament, has never been admitted by the appellants, but was expressly disputed in the cause. The decree declares that the appellants are entitled to receive back no more than the amount of $1\frac{1}{4}d.$ per ton per mile, out of the rate of $2\frac{1}{4}d.$ paid by them; whereas it ought to have been declared that they are entitled to receive back $1\frac{1}{2}d.$ per ton per mile, out of the said rate of $2\frac{1}{4}d.$ The acts of Parliament do not sanction the charge for haulage, and this suit being instituted for repayment of all monies illegally exacted under authority of the Acts, from the 1st of *November*, 1836, the appellants are entitled to repayment of all sums exacted from them beyond the legal rate of $\frac{1}{2}d.$ per ton per mile. If the Court had considered that the respondents had any claim in respect of haulage or other services, it ought to have declared the appellants entitled to receive back the whole amount of the excess above that which has been decided to be the legal parliamentary charge, after deducting such sums, if any, as might appear to be justly chargeable against them for haulage; and in that case an account ought to have been directed to be taken of what haulage or other services, if any, had been rendered by the railway company to the coal company, and what sums were properly payable by the coal company in respect thereof.

Secondly, as the decree established the right of the appellants to recover back sums illegally exacted, they ought to have been allowed interest upon the several sums so exacted, from the times when such over-payments were

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respectively made. They recovered interest at law on the amount of over-payments made during the period to which the judgment at law applied, and to allow the respondents the benefit of the interest on the monies which were subsequently extorted—illegally as has been now decided—is contrary to the plain principles of equity. The order ought to be that, in ascertaining the amount ordered to be repaid to the appellants, the several sums of 141*l.* 0*s.* 9*d.*, 4000*l.*, and 3597*l.* 16*s.*, paid by the respondents into Court to the credit of the cause, should be taken as repayments on account to the appellants, at the several times when the same were respectively paid into Court. The result of the cause being, that those monies were the appellants' monies, they ought to have been declared to be entitled to the whole of the stock purchased with them, and to the dividends and accumulations thereof. These being over-payments, which ought never to have been made, and being now declared to be the monies of the appellants, they are entitled to all the benefit that accrued from the investment of them.

The last objection to the decree is, that it fixes the appellants with the costs of the suit, in which they have succeeded, the Vice Chancellor thinking the suit was unnecessary or premature. But the suit being occasioned by the threat of the respondents to distrain on the appellants for the exaction of illegal rates, the decree, instead of visiting the costs on the appellants, whose rights were established, ought to have ordered the whole costs to be paid by the respondents. The appellants were entitled to the benefit of the final judgment in the action from the date of that judgment (*November* 1840); and their right to maintain a suit in Equity, founded on their legal title, accrued from that date, and not from the date of the decision of this House, by which the respondents writ of error was dismissed. It was, therefore, a mistake to hold that the bill in this cause was filed too soon, or that it was inconsistent with the agreement made in *August* 1836.

The legality of the charges for the inclined plane having been established by the decision in the action, the appellants have submitted to that decision, and raised no question on that point in this cause.

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Mr. *Bethell* and Mr. *Smythe* for the respondents.

As to the objection to the decree for having given the respondents their costs, the Vice Chancellor could not do otherwise. The bill was not only premature but quite unnecessary, as the action at law would have put a true construction on the Railway Act, and disposed of all the matters in dispute; they were all, except the costs, actually settled out of court before the bill was filed. The appeal has been brought for costs only.

The real question in the cause was, whether the railway company was entitled, up to the 31st of *December*, 1840, to charge 1*d.* or $\frac{1}{2}$ *d.* for the transit of coals on the railway for export. The passages read from the respondents' answer to the bill on the hearing of the cause, put the appellants out of Court on the merits of that question, for it showed that the $\frac{1}{2}$ *d.* per ton per mile for the haulage was never disputed. That $\frac{1}{2}$ *d.* formed part of the original charge of 2 $\frac{1}{4}$ *d.* It has been decided in the action at law that the legal charge for the transit of the coal by the railway was only $\frac{1}{2}$ *d.* per ton per mile, so that if that charge be added to the charge of $\frac{1}{2}$ *d.* for haulage, and other services of that nature, not denied to have been rendered by the respondents, and if both charges, amounting to 1*d.*, be deducted from the rate of 2 $\frac{1}{4}$ *d.*, which was actually charged, the appellants will be entitled to repayment of the difference. The passage of the answer which was read at the hearing of the cause, distinctly claimed the charge for haulage, and there is no room left for alleging that it is a shift and pretence now set up for the first time. But it also appears, by the special verdict in the action, that the only difference between the parties

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was, whether $1\frac{1}{2}d.$ or $\frac{1}{2}d.$ was the legal charge for the transit of the coals. The bill contained an error on this point, which was corrected in the answer.

[*The Lord Chancellor.*—The bill denies that any haulage, or other service in the nature of haulage, was done for the plaintiffs by the railway company, and denies that the company had any right to charge for it. There is no evidence that any such services were done. Unless there is some evidence of that sort, then it is clear the respondents put the appellants under duress to pay what they had not shown any right to].

Not only the special verdict and the answer to the bill, but also the evidence in the action, showed that the dispute between the parties was limited to the charge for transit, the charge of $\frac{1}{2}d.$ for haulage having never been disputed.

As to the objection that the decree did not give the appellants the interest on the monies invested, it appears that the monies were paid by agreement, and the respondents were to hold them until the decision of the Court could be obtained in the action. That agreement was renewed at the trial, and extended till final judgment in the action, as stated in the answer to the bill. The monies were subsequently paid into Court, by orders in this cause, made by consent, for security only, and without any intention of making them productive to either party under the circumstances. Regard being had to that agreement, the appellants could not be entitled even to the principal monies at the time of filing their bill, there being then no final decision in the action. The question of interest depends on the rights of the parties at the date of filing the bill, which professed to be founded on a final decision in the action, which, however, was not given until 1844.

[*The Lord Chancellor.*—It appears that one of the orders for paying the monies into Court and vesting

them, was obtained on the application of the appellants, although with consent of all the parties. The decree orders the monies so paid in, to be repaid, without the interest.)

All the embarrassment in the case arose from the filing of the bill unnecessarily, or, at all events, prematurely: the Vice Chancellor would have done right if he had dismissed it altogether.

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Mr. *Stuart*, in reply.—The main question is, how much we are to recover back; the decree recognizes our right to recover in respect of over-payments, and therefore leaves no ground for any argument for dismissing the bill.

The *Lord Chancellor*.—It appears to me—but I do not know whether the noble Lords who are present concur with me—that as the Court has pronounced a decree for the repayment of sums of money, and as the parties against whom that decree was made have not appealed, we cannot now take any notice of the argument that the Court ought to have dismissed the bill.

Lord *Brougham* and Lord *Campbell* assented.

Mr. *Stuart*.—That relieves me from the consideration of all questions except this,—whether or not we have got back as much as we are entitled to? Now, how can it be said, taking the case upon the bill and answer, that we have got back all that was justly due to us? The difficulty has arisen from the statement in the answer with respect to haulage or other services. That statement admits that the monthly accounts, up to the end of *December* 1840, were made out without any separate charge for haulage, or any services whatever. There was no separation in the accounts between the charge for haulage or other services, and the charge for the export tonnage rate. They were mixed up together all the time, from the 1st of *November*, 1836, till the end of *December* 1840.

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We charge in our bill that no haulage or other services were performed, and, therefore, there was no right to make any charge for them during that period. How do the defendants meet that charge in their answer? Is it in evidence that, during the period from the 1st of *November*, 1836, to the end of *December* 1840, any haulage or other services were performed? Certainly not. But this is admitted, that whatever haulage or other services were performed, were to be paid for under a special agreement, and not to be levied under the authority of the acts of Parliament; and, moreover, that there never has been any dispute between the parties upon that subject. Now, what is stated in the answer, but which has not been proved in evidence, cannot be assumed to be true, though it may be the subject of inquiry. What is stated in the answer is that passage, the substance of which is, that they allege that they did perform haulages up to *August* 1837. That is their allegation, which they have not proved, and which, therefore, could only be made the subject of inquiry.

The *Lord Chancellor*.—They substitute other services in lieu of it after 1837.

Mr. *Stuart*.—Do they say here that we have agreed to pay for these other services?

The *Lord Chancellor*.—I do not think you need trouble yourself upon that. There is no doubt that the $\frac{1}{2}d.$ was charged from *November* 1836, up to the end of 1840, for something. They say it was in respect of haulage. Then the answer states that the haulage was discontinued in *August* 1837, but they then performed other services which entitled them to the $\frac{1}{2}d.$ per ton per mile, and so it stands upon the answer, and there is no evidence on either side; I think, therefore, there ought to be an inquiry whether the railway company are entitled to the $\frac{1}{2}d.$ per ton per mile from *November* 1836 to *December* 1840, with respect to haulage or any other services,—whether they are entitled to it in any way.

Mr. Stuart.—We are perfectly satisfied with that inquiry; it will bring out the justice of the case.

The Lord Chancellor.—If you fail in that inquiry, you will of course have to pay the costs of it.

Mr. Stuart.—That is the main alteration in the decree which I ask; but I ask also that we may have the costs. We have been made to pay the costs; although it is admitted by the decree that we have made over-payments.

Lord Brougham.—Then you mean to say that the alteration which is now suggested in the decree, giving you an inquiry, would relieve you from paying the costs which you have been made to pay.

Mr. Stuart.—On the decree as it stands, we ought to have had the costs.

The Lord Chancellor.—The way in which the facts are established now, is, that the railway company did make an excessive demand. An action was brought to try their right to make that demand, in which the railway company failed. That concluded the question up to *November 1836*. After final judgment in that action, the railway company continued to make the demand, and to exact from the coal company the payment of these excessive sums: the bill then was filed for the purpose of securing the money over paid, not to leave it in the hands of the railway company, but to get it secured in Court; and also for an injunction to restrain them from going on making these illegal demands, as they ultimately turned out to be. Supposing that the Court had jurisdiction—which is not now in dispute—I cannot say that that was a bill improperly filed, because they were going on charging money against which there was final judgment at law. When they got the judgment of this House, it only showed that they were wrong from the beginning; the parties clearly had the right to file the bill. The result must be, according to the view I take of it, that the plaintiffs ought to have the costs up to the hearing.

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Mr. *Stuart*.—It is the common case of a plaintiff succeeding in his demand.

The *Lord Chancellor*.—He is justified in filing the bill, and he has succeeded in his demand.

Lord *Brougham*.—What takes place afterwards must depend upon the result of the inquiry. Not only you may not have your costs *quoad ultra*, but you may have to pay the costs.

Mr. *Stuart*.—The subsequent costs I ask to be reserved; that is just: there is a dispute not yet determined, but referred for inquiry.

There still remains the question of interest on the money invested in stock—the question of our having the stock upon the footing of the payment having been made into Court at our risk. I ask your Lordships to give us either the interest or the benefit of the investment in the stocks. There is some difficulty about the terms of the orders being made by consent; but what I say about our right to have the stock, and the fruits of the investment of these sums—which ought never to have been taken from us—is, that it was our application to the Court which produced the investment; and whether they consented to it or not, even if the investment was made by their consent, being made on our application, no consent of theirs could relieve us from the consequences of having applied to the Court to invest. The investment was made on our application, and, according to my view, it would be open to them, if it turned out that we had been wrong instead of right, and if they became entitled to the money in dispute, to say, “It was you who applied to the Court to invest it; you have been raising a dispute in which you have failed; the result of your failure is, that the bill is dismissed, and we are put in the same position that we were in before; we are now entitled to that money in dispute between us, and if we had it, we should have had interest; now you fail in your suit, and your investment in the funds has turned

out badly, and we are to be paid for the result of those two bad speculations." I think the result in that case would be, that the railway company would be entitled to get back their money with interest, and also the costs of the suit. Why should the same justice not be measured out to the appellants?

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The *Lord Chancellor*.—Assuming that the application was on your behalf, you do not ask to have the stock and the dividends upon it, but you ask for the original naked sum: that is the order you have got. If you meant to say that the money invested and the stock purchased with it was yours in the result, that it was invested on your risk, you ought to have asked for the stock and not for the money. I am now looking at the order of the 16th of *March*, 1842. The order merely directs the payment of the 4000*l.* into Court, and to invest it; that is consistent, and so is the order of *December* 1842. Then the decree gives you the original sums. Now, does your appeal apply to that? There is no question about interest, properly speaking. What you are now claiming is the fruit of the investment; and do you raise that question in your appeal?

Mr. *Stuart*.—We do distinctly in our third reason; and in our petition in the cause—which was adjudicated upon by the Vice Chancellor at the same time with the cause, and the order on it is incorporated in the decree,—we say that these sums, on account of over-payments, were to be treated and allowed as payments at the time when they were paid into Court, and that the petitioners, the coal company, are entitled to the stock which has arisen from the investment of the said sums, and to all the accumulations and dividends thereof. Now, that is treating it in a very fair manner, because we say they were payments on account when these sums of money were paid into Court, in consequence of our filing this bill, in which we turn out to be right. We take them as

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payments on our account. Up to that time we charge interest on the money, because it was in the pocket of these parties.

The *Lord Chancellor*.—That is not in question now; you are only asking for the dividends upon the investments.

Mr. *Stuart*.—I ask to take the stock purchased with those sums of money paid into Court, as repayments *pro tanto* of the overcharges.

The *Lord Chancellor*.—The difficulty arises from its being done by consent.

Mr. *Stuart*.—As to the consent, I trust your Lordships will be of opinion, that if, upon our application, this is done, and they consent to our entering upon this speculation—

The *Lord Chancellor*.—The worst of it is, that it does not appear that it was part of your application. You apply for an injunction, and then, by some arrangement, it was settled that the money should be paid into Court. I cannot understand those words in any other sense. "By consent, and without prejudice to any question in the cause;" the money was deposited *in medio* to abide the result of the question of right, and it was to become the property of whichever party should succeed on the question of right.

Mr. *Bethell*.—Those sums have not been ascertained to be due at all. They are general sums of money paid in on account, not like the specific sums paid originally into the *Darlington* Bank; but these other sums are paid in merely as security.

The *Lord Chancellor*.—We can only judge by the order what was the intention of the parties. The order was, that the defendants, the railway company, do, within six weeks from the date thereof, pay the sum of 4000*l.*, on account of the over-payments made by the plaintiffs to the defendants, according to the judgment of the Court of Common

Pleas, without prejudice to the amount of over-payments into the bank, with privity of the Accountant General, &c. That they agreed to pay, because they admitted there had been a decision against them, and that that 4000*l.*, therefore, was due from them to the coal company. They might as well have paid it to the coal company at once, except on account of this, that there had not at that time been judgment in this House on the writ of error. They say that there being a judgment, and it now being ascertained that the contract between the parties was final judgment in the action, and not in this House, no doubt that 4000*l.* was payable by the railway company to the coal company. Instead of paying it over to the latter, the money was paid into Court and invested. The parties agreed to lay it out. What could they agree to lay it out for but that the money, the investment, should abide the result of the question of right and go to the party who succeeded? There was a subsequent order to pay in 3597*l.* There was altogether 7500*l.* and odd, viz.: 4000*l.*, 3597*l.* and odd, paid in upon the two orders, besides that which was paid into the *Darlington* bank; that was a small sum of 141*l.*, but it comes to rather more than what is subsequently found to be due, and, no doubt, the railway company are entitled to have the difference repaid, that is to say, to have so much of that money as was not due from them.

Mr. *Stuart*.—That is a mere question of apportionment, about which there can be no difficulty. Here you are dealing with this investment in respect of over-payments charged upon us, now decided to have been over-payments, and pending the time that we were obliged to consume in litigation with this party, an accumulation of the dividends takes place—

The *Lord Chancellor*.—I do not think we need trouble you; you are entitled to have restored so much of the stock as represents the money which you are found entitled to,

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I proceed on this ground, which does not interfere with any rule of the Court, that the parties paying in the money, which afterwards turns out to be the property of the coal company, have by consent agreed that that should be invested. That consent is repeated in the last order.

Mr. *Stuart*.—Then I have nothing to trouble your Lordships with; that sets the decree right as to the amount of over-payments; the enquiry that your Lordships suggested will bring out the truth on the other question; subsequent costs will be reserved. We shall be entitled to costs of the suit up to the hearing, and to have the stock, or so much of it as is now ascertained to have been purchased with our money—to have the stock and the accumulations transferred to us.

The *Lord Chancellor*.—You must have a reference upon some of those matters.

Mr. *Stuart*.—Yes, of course. There will be no difficulty in working them out in detail.

The order and judgment of the House was to this effect:—

“That so much of the said decree, complained of in the appeal, as directs it to be referred to the Taxing Master of the Court of Chancery, to tax the defendants (respondents) their costs of the suit and the said petition, and as orders that such costs when taxed should be paid by the plaintiffs (the appellants), by being set off as thereafter mentioned, be and the same is hereby reversed; and it is declared that the Durham County Coal Company were entitled to so much of the stock and cash standing to the credit of the cause at the date of the decree as represents 141*l.* 0*s.* 9*d.*, with 1*l.* 2*s.* 6*d.* interest thereon, making together the sum of 142*l.* 3*s.* 3*d.*; the sum of 4000*l.*—which were respectively paid into Court and invested under order of the 16th of *March*, 1842—and the sum of 3391*l.* 12*s.* 10*d.*, part of the sum of 3597*l.* 16*s.* cash, which was also paid into Court, and invested under order of the 5th of *December*, 1842, it being admitted that the said sums of 141*l.* 0*s.* 9*d.*, 4000*l.*, and

3391*l.* 12*s.* 10*d.*, making together the sum of 7532*l.* 13*s.* 7*d.*, is the amount in the decree mentioned agreed to be received back by the Durham County Coal Company.

“ And it is further ordered, that it be referred to the Master of the said Court to ascertain the portion of the said stock and cash which belonged to the said coal company, having regard to the aforesaid declaration ; and also to inquire and state how much of the 8535*l.* 19*s.* 11*d.* bank three per cent. annuities, and 372*l.* 9*s.* 9*d.* cash, standing in the bank in the name of the Accountant General, to the credit of this cause at the date of the said decree, was sold and applied in payment of the sum paid by the said Accountant General, under the said decree, to F. Scott Stokes and Geo. Townsend Andrews, as trustees of the said coal company, and what is the amount of the difference between the portion of the said 8535*l.* 19*s.* 11*d.* bank annuities, and 372*l.* 9*s.* 9*d.* cash, sold and applied for the purpose of the last mentioned payment, and the portion of the said 8535*l.* 19*s.* 11*d.* bank annuities, and 372*l.* 9*s.* 9*d.* cash, which he shall find to have belonged to the said coal company. And it is further ordered, that the said Master do ascertain the value in cash, according to the price of stock at the time of the last mentioned sale, of the excess (if any) of the stock and cash so belonging to the said coal company, over the stock and cash sold and applied in making the aforesaid payment to the said F. S. Stokes and G. T. Andrews, as trustees of the said company. And that what the Master shall find to be the amount of the value in cash of such excess at the time aforesaid, be paid by the defendants, the *Stockton* and *Darlington* Railway Company, to the said trustees of the said coal company.

“ And, it is further ordered, that it be referred to the Taxing Master of the said Court to tax the plaintiff's their costs of this suit and of the said petition, up to and including the costs of the hearing of this cause in *January* 1845, before His Honour the Vice Chancellor of England ; and that such costs, when taxed, be paid by the defendants, the railway company, to the said trustees of the said coal company.

“ And it is further ordered, that it be referred to the said Master in rotation to inquire and state to the Court whether the said railway company were entitled to a charge of $\frac{1}{2}$ *d.* per ton per mile, or any or what other charge upon any and what quantities of coals sent or carried by the said coal company, along the *Stockton* and *Darlington* Railway, in any

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part thereof to *Sim Pasture*, between the 1st of *November*, 1836, and the 31st of *December*, 1840, in respect of haulage or any other services done or rendered to or for the said coal company by the said railway company during the last mentioned period, or any or what part or parts thereof, and if he shall find that the railway company were entitled to make such charge, that he do also ascertain what is the amount of the several sums of money which were charged by the said railway company to the said coal company during the last mentioned period, in respect of the last mentioned rate of $\frac{1}{2}d.$ per ton per mile, and what is the amount which the railway company were entitled to charge as aforesaid.

“And it is further ordered, that all further directions and subsequent costs be reserved until after the said Master shall have made his report; and that the said cause be remitted back to the Court of Chancery to do what may be just and consistent with this judgment and declaration.”—*Lords' Journals*, 18th of *March*, 1847.

HENRY BARROW EVANS and others - *Appellants.* 1847.
 RICHARD ASHLEY SCOTT and others - *Respondents.* March 22, 23,
 25, and 30.
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Portions.

The trusts of a term in a post-nuptial settlement of real estates were: "After the decease of the husband and wife (the settlors), to raise 1000*l.* for the portion of every daughter and younger son, to be paid to sons at the age of twenty-one, and to daughters at that age or marriage, if such ages should be attained or marriages had after the decease of the survivor of the settlors, and not sooner: And if any younger son died, or became an eldest or only son before twenty-one, or any daughter died before that age unmarried, or before his or her portion became vested, the portions provided for such son or daughter, so dying, &c., before his or her portion became payable as aforesaid, should survive and accrue to the survivors of such daughters and younger sons, to be equally divided between them, and paid when their original portions should become payable."

Then followed a proviso for the issue of a younger son or daughter dying in the lifetime of the settlors, or after their death before his or her portion became due and payable: And a trust, after the death of the settlors, for maintenance of such sons and daughters, or their issue, entitled to portions as aforesaid, until his or her portion became payable: With *cesser* of the term, on payment of the portions, or in case there should not be any younger children or issue of them living at the death of the survivor of the settlors.

The settlors had seven children (besides an eldest son), four of whom died in the lifetime of their parents, under the age of twenty-one, and unmarried.

Held, by the Lords, reversing a decree in Chancery, that the three survivors were entitled to have the portions of the four deceased children raised for them, in addition to their own.

THE question in this appeal was, whether a sum of 7000*l.* or 3000*l.* was raiseable under the trusts of a term comprised in a post-nuptial settlement, made, in 1794, by and between *Charles Evans* and *Mary Caroline* his wife, of the first part, and three sets of trustees of the second, third, and fourth parts, respectively.

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By that settlement, real estates (which had been devised to the lady by her father) were limited to the use of trustees for 99 years, upon trusts long since determined, and subject thereto to the use of the said *Charles Evans*, for his life; with remainder to the use of the said *Mary Caroline Evans*, for her life; with remainder to the use of trustees to preserve contingent remainders; with remainder to the use of *John Niblett* and *Thomas Brockhurst*, their executors, administrators, and assigns, for a term of 500 years, to commence from the day of the decease of the survivor of them, the said *Charles Evans* and *Mary Caroline* his wife; with remainder to the use of *Charles Barrow Evans* (then the only son and heir apparent of the said *Charles Evans* by the said *Mary Caroline* his wife, but since deceased), and his assigns for his life; with remainder to the use of trustees during his life to preserve contingent remainders; with remainder to the use of the heirs male of the body of the said *Charles Barrow Evans*, with other remainders not necessary to be mentioned.

The deed then proceeded to declare, that the term of 500 years was limited upon this special trust, and for the intent and purpose that they (the above named trustees)

Trust to raise
1000*l.* for
daughters and
younger sons.

“Do and shall, after the decease of the survivor of them, the said *Charles Evans*, and of the said *Mary Caroline* his wife, by sale, mortgage, or demise of all or any part of the premises herein comprised, or by and out of the rents, issues, and profits thereof, as to them (the trustees) shall seem meet, levy and raise the sum of 1000*l.* for the portion of each and every of the daughter and daughters, younger son and sons of the said *Charles Evans* by the said *Mary Caroline* his wife, to be paid, &c., that is, the portion or portions of such of them as shall be a younger son or sons to be paid unto him or them at his or their age or ages of twenty-one years, and the portion or portions of such of the said children as shall be a daughter or

daughters, to be paid to her or them at her or their age or respective ages of twenty-one years, or day or days of marriage, which shall first happen, *if such respective ages shall be attained or marriages had after the decease of the survivor of them, the said Charles Evans and Mary Caroline his wife, and not sooner.*"

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"And in case any of the younger son or sons of the said *Charles Evans*, by the said *Mary Caroline* his wife, shall happen to die before he or they shall have attained his or their age or respective ages of twenty-one years, or shall happen to become an eldest or only son before he shall attain his age of twenty-one years, or if any of the daughters of the said *Charles Evans* by the said *Mary Caroline* his wife, shall happen to die before she or they shall have attained her or their age or respective ages of twenty-one years or have been married, or before his, her, or their portion or portions shall become vested, then and in such case the portion or portions hereinbefore provided for all and every such younger son or sons so dying, or becoming an eldest or only son, and for all and every such daughter and daughters so dying and unmarried, before his, her, or their said portion or portions shall become payable as aforesaid, shall go, survive, and accrue to the survivors and survivor of such daughters and younger sons, equally to be divided between them, and to be paid and payable at the same time and times as his, her, or their original portion or portions is or are hereinbefore directed to be raised and paid, or shall become payable as aforesaid: And if any other of the children, being a son, shall die or become an eldest or only son before the times or ages aforesaid, or, being a daughter or daughters, shall die unmarried before the said age or ages, then such surviving or accruing portion or portions shall, from time to time, be again subject and liable to the same or the like right, chance, or condition of accruer or survivorship to and amongst the remaining child and children, as herein-

Clause of
accruer and
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Proviso for
issue to take
deceased
parents'
shares.

Trust to raise
maintenance.

before is expressed, touching his, her, or their original portion or portions."

" Provided always, that in case any or either of such younger sons or daughters shall happen to die in the lifetime of the said *Charles Evans* and *Mary Caroline* his wife, or after the decease of the survivor of them, before his, her, or their portion or portions so provided and intended as aforesaid shall become due and payable, leaving issue, then such child or children to be entitled to have, receive, and take the share or shares, portion or portions, as his, her, or their parent or parents would have been entitled unto if living, in equal shares and proportions, if more than one, and if but one, then he or she to have, receive and take the whole thereof, subject to the like clauses of survivorship or right of accruer."

" And upon further trust, that they (the said trustees) do and shall in the meantime and from and after the decease of the survivor of them the said *Charles Evans* and *Mary Caroline* his wife, by and out of the yearly issues and profits of the said premises comprised in the said term of 500 years, raise and pay unto, for or towards the maintenance and education of all and every of the said younger son and sons, daughter and daughters of the body of the said *Charles Evans* by the said *Mary Caroline* his wife, entitled to such portion or portions as aforesaid, or the issue of such son or sons, daughter or daughters, who shall then be entitled thereto as aforesaid, interest for their respective portions at and after the rate of 5*l.* for every 100*l.* by the year, until his, her, or their original portion or portions shall become payable by virtue of these presents; and upon this further trust to permit and suffer the said *Charles Barrow Evans*, or the person or persons who shall, by virtue of the limitations hereinbefore contained, be then entitled to the reversion and inheritance of the said premises comprised in the said term of 500 years, to receive and take the residue of the rents, issues, and profits

of the said premises to and for his or their own use and benefit."

"Provided also, and it is hereby declared, that from and immediately after the raising and paying the said respective portions hereinbefore provided for the said younger son and sons, daughter and daughters of the said *Charles Evans*, by the said *Mary Caroline* his wife; or in case the said portion or portions shall be paid by the said *Charles Barrow Evans*, or the person or persons who shall or may be entitled to the reversion and inheritance of the said premises expectant on the determination of the said term of 500 years; or in case there shall not happen to be any younger children, or the issue of any of them living at the time of the decease of the survivor of them the said *Charles Evans* and *Mary Caroline* his wife, then and in either of those cases, the said term of 500 years shall cease, determine, and become absolutely void."

The deed contained, among other powers and provisoes, a power to raise 10,000*l.* for such purposes as the said *Charles Evans* and wife might appoint; and a power to raise 10,000*l.* for the advancement and benefit of the younger children, in addition to the provisions made for them under the said term of 500 years.

There was issue of the marriage between *Charles Evans* and *Mary Caroline* his wife, nine children, three born before the date of the settlement, and six afterwards, viz.: *Charles Barrow Evans*, the eldest son (father of the respondent, *C. B. Evans*), *Thomas Barrow Evans*, born in 1791; *Mary Caroline*, born in 1792; *Maria Augusta*, born in 1794; *Henry Barrow*, born in 1796; *Mary Ann*, born in 1797; *Lucia Maria*, born in 1799; *Edmund Barrow*, born in 1800; and *Catherine Sophia Evans*, born in 1802. *T. B. Evans*, the second son, died previously to the date of the settlement; four of the other younger children, viz.: the said *Mary Caroline*, *Mary Ann*, *Lucy Maria*, and *Catherine Sophia Evans*, died in

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the lifetime of their parents, under the age of twenty-one years, and unmarried. Their father died in 1819, leaving his said wife and the other four children surviving.

In 1820, certain deeds, to some extent resettling the estates, but still subject to the trusts of the term of 500 years, were executed by Mrs. *Evans* and *C. B. Evans*, the eldest son, and others therein named ; and, in pursuance of these deeds, a sum of 10,000*l.*, in lieu of the 10,000*l.* provided for by the settlement of 1794, was raised for the three younger surviving children.

Mary Caroline Evans, the widow, died in 1837, leaving the said eldest and two younger sons and a daughter surviving, and thereupon *C. B. Evans*, the eldest son, became tenant for life in possession of the estates comprised in the settlement. He died in 1841, leaving the respondent, *C. B. Evans*, his eldest son, who thereupon became the first tenant in tail of the said estates, subject to the charges affecting them under the said indentures.

In 1844, a bill was filed in Chancery, in the name of the respondent *C. B. Evans*, infant tenant in tail, by his next friend, against the respondent *R. A. Scott*, assignee of the term of 500 years, and against the appellants *H. B. Evans*, *Edmund B. Evans*, and *Maria Augusta Evans*, the surviving younger children of *Charles Evans* and *Mary Caroline* his wife.

By this bill, and the answers of the defendants thereto, the question was raised whether the sum of 7000*l.*, that is, 1000*l.* for each child of *Charles* and *Mary Caroline Evans*, except the eldest son, living at the date of the settlement of 1794, or born afterwards, was raiseable out of the settled estates, under the trusts thereof, or only 3000*l.*, that is, 1000*l.* for each of the three younger children who lived to attain the age of twenty-one years, and survived both parents.

The cause was heard before Vice Chancellor *Knight Bruce*, who, by his decree thereon, declared that in the

events which happened the principal sum of 3000*l.* only became, and was raiseable for the portions of the surviving daughter and younger sons of *Charles Evans* and *Mary Caroline* his wife, under the indenture of *February, 1794*, in the pleadings mentioned, and that the same became so raiseable from the death of the said *Mary Caroline Evans*, with interest thereon from that time, at the rate of 4*l.* per cent. per annum (*a*).

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The surviving younger sons and daughter appealed against the decree.

Mr. *Turner* and Mr. *Wigram* (with whom was Mr. *G. M. Giffard*) for the appellants.

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According to the true construction of the trusts of the settlement, the appellants are entitled to have 7000*l.*

(*a*) The following extract is made from a short-hand writer's notes, which were furnished to the Lords, and admitted by the counsel on both sides to be correct :—

Vice Chancellor Knight Bruce.—"The good sense of the dispute involved in this case, if such an expression may be used, seems to be rather on the side of the plaintiff than on that of the defendants; but, of course, the question being one of mere law, must be decided on legal principles merely. The settlement to be construed—which is inartificially and inaccurately worded, and, as to the interpretation of which, it was scarcely possible to expect that differences should not arise—may, perhaps, be conjectured to have been prepared with the aid, if that is a proper term, of some precedent or form inapplicable to the case, either alone or together with some other precedent, which by itself might have been serviceable. However it may have been, it is not clear that a part of its provisions does not transgress the rules of law. That particular point, however, does not arise on the present occasion. The facts, with reference to which the Court has to interpret the deed, are these :—Mr. and Mrs. *Evans*, the settlors, are dead; there were nine children of their marriage; four only of them, three sons and one daughter, survived their parents, and they included the son, who, when the settlement was made, was the only son. The other five died in their father's

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raised for them, with interest from the date of their mother's death. It is no objection to their claim that they thought for some time after their title accrued, that a sum of 3000*l.* only, that is, 1000*l.* for each, was raiseable,

lifetime, minors, without having been married. One of the five died before the date of the settlement. In this state of circumstances, the defendants contend, that the amount of portions raiseable under the term of 500 years, for the daughter and younger sons who survived the parents, is 7000*l.*, the plaintiff, that it is only 3000*l.*

"The first question is, what are the meaning and effect of these words, 'do and shall, after the decease of the survivor of them, the said *Charles Evans*,' &c. [His Honour read the clause of the deed of settlement for raising 1000*l.* for the portion of each of the younger children, as above, p. 44, and proceeded.] "What, I say, are the meaning and effect of these words, considered as standing alone, as not controlled or affected by any part of the context? Thus considered, I am of opinion, certainly, that they must be read as not showing an intention that any child should take more than 1000*l.*, and as not extending to any daughter or younger son who should die in the parents' lifetime a minor, without having been married; that is, as not providing a portion for any child so circumstanced. To hold otherwise would be to contradict the most clearly binding authority. The case is one of portions charged on real estate by deed. What, however, is the effect of the context? I am not sure that its effect is not so to restrict the words I have quoted, as to prevent them from extending to any child, who, at whatsoever age, should, whether married or unmarried, die in the lifetime of Mr. and Mrs. *Evans*, without leaving issue. 'This particular point, however, I think it not necessary to decide, and I leave it undecided. A question necessary, however, to be determined is, whether the second clause, that I mean immediately following the words that I have read, comprises or extends to younger children who should, in the lifetime of Mr. and Mrs. *Evans*, die minors, without having been married, because if it does, it may be thought to defeat the plaintiff's case, or give weight to that of the defendants.

"That clause is expressed, 'and in case any of the younger son

and they were content to receive the interest of that sum ; but, in 1841, they were advised that they were entitled to 7000*l*. Upon due consideration of the clauses and provisions of the settlement, the meaning to be collected from

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or sons of the said *Charles Evans*, &c. [His Honour read the proviso for accruer, as above, p. 45]. “ Whatever may be thought of the words ‘ survivors and survivor,’ the words, ‘ his, her, or their portion or portions,’ and the words ‘ hereinbefore provided,’ in this clause, seem to me not immaterial, in my judgment, combined with other parts of the deed, and particularly with the language of the provisions relating to maintenance and education, and interest, where the words are ‘ for and towards the maintenance and education of all and every the said younger son,’ &c. [He read the trust to raise maintenance, as above, p. 46]. “ They have the effect of showing that the second clause (the accruer) was not intended to comprise or extend to any younger child, who in the parents’ lifetime should die a minor without having been married. Consistently with the first clause quoted, considered as standing alone, such a child could not be a child for whom a portion was intended, nor, of course, could such a child be within the provision as to maintenance, education, and interest occurring later in the deed to which I have already referred ; but younger children who, after their parents’ death, should die minors, without having been married, must, in every possible view of the settlement, be considered as children for whom portions were provided, although not become entitled to receive the capital, or to a vested right in the capital ; for the interest is made a fund for their maintenance.

“ On the whole, after reading this deed more than once, and attending to the arguments that have been addressed to me, and especially by Mr. *Hodgson*, upon the words, ‘ or before his, her, or their portion or portions should become vested,’ and upon the mode in which the word ‘ payable’ is used, I find myself unable to come to the conclusion that the context renders it necessary or fit to interpret the clause which I first read, as extending to any daughter or younger son who should die in the parents’ lifetime a minor without having been married ; that is, as providing a portion for any child so circumstanced ; and looking at every part of the instrument,—but not saying whether, if either of the children who died

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them is, that a portion of 1000*l.* was to be raised in respect of each and every child, except the eldest son, and the portions of such of them as, being sons, should die under the age of twenty-one, or, being daughters, should die under that age, and without being married, were to survive to the others. There is no claim now made in respect of the child who died before the date of the settlement, but every child then *in esse* (except the eldest son), and born afterwards, was entitled to an expectant interest in 1000*l.*, payable at the age of twenty-one, or on marriage, and after the decease of the parents. Four of the children having died before any of these events occurred, the portions that were chargeable for them became, by virtue of the clause of accruer, raiseable for those who survived, and who fulfilled all the conditions. The raising of the portions were postponed by the settlement until after the death of both parents, but that did not prevent them being charges on the estates in the events that happened. The Vice Chancellor, in his construction, relied too confidently on the terms of the clause for maintenance and education, which, of course, must be held applicable to children who survive their parents, those who die before not requiring maintenance. That clause is quite independent, and should not be held to govern the construction of the other clauses. The material clauses are the first, for raising the portions, and the clause of in the parents' lifetime had so died after attaining majority, or had, after the deaths of Mr. and Mrs. *Evans*, died in minority without having been married, the amount raiseable for portions under the term would or would not, in my opinion, have been more than 3000*l.*,—I think that, in the events which have happened, I am rightly construing the deed before me, and acting in conformity with the spirit of such decided cases as can be considered of authority on this subject, in holding, that the whole amount of principal raiseable for portions under the term of 500 years, is 3000*l.*; and I do so declare. The directions consequential on this declaration will be much of course."

accruer and survivor, which, taken together, will not bear the Vice Chancellor's construction. The principle of construction applicable to them, is that which is found in the case of *Emperor v. Rolfe* (b).

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There is no question as to the vesting of the portions in the present case; nor is there any doubt that the appellants fulfil the conditions upon which the settlement directed the portions to be raised, and to go over under the clause of accruer. The question is, has that clause come into operation? Let us take the case of only one of the deceased children, *Mary Caroline*, for instance, who died in 1812, under the age of twenty-one, and without having been married, it is clear that, in that event, the portion of 1000*l.*, raiseable for her, passed by the clause of accruer to the survivors who lived to fulfil the required conditions; upon the events mentioned happening, the clause came into operation.

Mr. *Russell* and Mr. *Hodgson* (with whom was Mr. *J. B. Parry*) for the respondents.

Courts of equity have gone far in struggling against and controlling the meaning of words contained in settlements for raising portions for younger children. It is admitted, on the part of the appellants, that the motive for this settlement, construed as they suggest, was to effect an extraordinary purpose. Their construction would lead to this, that only one younger child attaining twenty-one, and surviving the parents, would take all the portions, to the impoverishment of the eldest son. Disregarding the main scope of the settlement, they resort to the two first clauses for the purpose of giving a construction to the whole deed. Upon the true construction of the whole of this settlement, it is clear it was not the intention of the settlors that any portion should be raised for a

(b) 1 Ves., sen. 208.

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daughter or younger son who should die in the lifetime of the parents or the surviving parent, or at least for a younger son who should die in the lifetime of such parent under twenty-one, or for a daughter who should die in the lifetime of the surviving parent under twenty-one, and without having been married. The clauses of accruer and survivorship were not intended to apply to or as between children, who neither survived both parents, nor, being sons, attained the age of twenty-one, or, being daughters, attained that age, or married: And as to raising portions out of real estate, it has been the settled law ever since *Poulet v. Poulet* (c), that if a child dies before his portion becomes vested, that portion is not to be raised.

It is evident, upon the face of this settlement, that some mistake happened in drawing it, and putting together clauses which are inconsistent with each other and with the general purposes of the settlement. It was a conveyance to trustees to uses; there is no fault in the limitations of the freehold, but the confusion is in the clauses declaring the trusts of this term of 500 years, by which a sum of 1000*l.* was to be raised—not for each and every child attaining twenty-one, or marriage—not a fixed sum of 7000*l.* or 10,000*l.* to be appointed or divided between such children in the usual way—but 1000*l.* for each and every child born, except the eldest son, with clauses of accruer and survivorship carrying over the portions of such of the children as should die under twenty-one unmarried. Such a settlement is not known in practice. The case of *Poulet v. Poulet*, in which the Court refused to order the raising of a portion which was not wanted, has governed the construction of many settlements. As in *Hinchinbroke v. Seymour* (d), Lord *Thurlow* said, “The meaning of a charge for children is, that it shall take place when it shall be wanted; it is

(c) 1 Vern. 204, 321.

(d) 1 Bro. C. C. 395.

contrary to the nature of such a charge to have it raised before that time." And Sir *A. Hart*, adverting to that case in *Edgeworth v. Edgeworth* (*e*), says, "It has been said that Lord *Eldon*, in *M'Queen v. Farquhar* (*f*), has impugned that authority by intimating that there was a circumstance of fraud, &c.; but I cannot think that Lord *Thurlow* would have been silent as to the fraud, if it had constituted the ground of his judgment. I imply from his language that he decided the case upon a principle applicable to every power of that nature, and intended to lay down the law of the rule generally, and not to make that case an exception to a rule. Lord *Thurlow's* opinion is justified by the doctrines of preceding Judges in other cases." Sir *A. Hart* cites those other cases, as *Bruen v. Bruen* (*g*), *King v. Withers* (*h*), and *Lord Teynham v. Webb* (*i*), in which last case Lord *Hardwicke* said, "the head of portions for younger children admits of a greater variety of determinations, and of judgment on circumstances, than perhaps any other head." The principle of construction of such provisions is to adjust the burdens on the estate between the eldest and younger children. The wording of the settlements must be struggled with, and so interpreted as to prevent their operating contrary to the intention of the parties. The reasonable interpretation of the clauses in this settlement is to hold that the 1000*l.* was to be raised for such children as should live to want it. The provisions are of an anomalous kind; the dispositive part of the trust does not agree with the creative part; if the portions were payable at twenty-one, or marriages, there would be no doubt. Suppose there were twenty or more younger children born, to raise 1000*l.* for each would leave the eldest no interest in these estates. The only construction that gives effect to all the clauses of the settlement, and

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(*e*) 1 Beatty, 328.

(*h*) Forrester, 121.

(*f*) 11 Ves. 467.

(*i*) 2 Ves., sen. 198.

(*g*) 2 Vern. 439.

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reconciles the authorities, is that which directs portions to be raised for those who live to the age of twenty-one—

[*The Lord Chancellor*.—*Cholmondeley v. Meyrick* (*k*), is opposed to that construction. If the attaining the age of twenty-one be the contingency to entitle to portions, then if any child died under twenty-one, leaving children, they would be destitute.]

Not so: that event is expressly provided for, and the words “share and shares” in that proviso show the inaccuracy and inaptness of the settlement. To attain the age of twenty-one, or marriage, was not enough to entitle a child to a portion, but also to survive the parents, “if such ages shall be attained, or marriages had, after the decease of the survivor of” the parents, upon which event also, in the accruer clause, the portions were to become vested. The *cesser* clause also was most material to be considered, it being thereby declared that the term should cease after payment of the portions, “or in case there shall not happen to be any younger children, or the issue of any of them living at the time of the decease of the survivor of the said *C. Evans* and *Mary Caroline* his wife.” The proviso for *cesser* has been the governing matter in those cases; *Powis v. Burdett* (*l*). In *Howgrave v. Cartier* (*m*), Sir *W. Grant* says, “If the settlement clearly and unequivocally makes the right of the child to a provision depend upon its surviving both or either of the parents, a court of equity has no authority to control that disposition. If the settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which the shares are to vest, the Court leans strongly towards the construction which gives a vested interest to the child, when that child *stands in need* of a provision, usually as to sons at the age of twenty-one, and as to daughters at that age or marriage.”

(*k*) 1 Eden 77. (*l*) 9 Ves. 428. (*m*) 3 Ves. & B. 79; Coop. 66.

[The *Lord Chancellor*.—But to reconcile the clauses in the present case with your construction, you must introduce some words, such as “after the death of the parents.” Now, what words would you introduce? Lords *Brougham* and *Campbell* put the like question.]

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None at all. We would only give their legal effect to the words that are found in the clause. [The learned counsel commented on some of the cases before referred to, and particularly on *Hope v. Lord Clifden* (n), which has also been cited for the appellants].

Mr. *Turner* replied.

The *Lord Chancellor*.—My Lords; it is a well established rule as to portions or legacies payable out of lands, that if made payable at a certain age, a marriage, or other event personal to the party to be benefited, and such party die before that time arrive, the portion or legacy is not to be raised out of the land; but if the payment be postponed until the happening of an event not referable to the person of the party to be benefited, but to the circumstances of the estate out of which the portion or legacy is to be paid, such as the death of a tenant for life, then it will be raiseable after the death of the tenant for life, although the term out of which it was to be raised had not arisen in consequence of the party to be benefited not having been *in esse* at the time of the death of the tenant for life, as in *Emperor v. Rolfe* (o), *Cholmondley v. Meyrick* (p), and many other cases. March 30.

The portions in question were provided for children who died infants and unmarried, and would not, therefore, according to this rule, be raiseable for the benefit of such children, but the question is, whether the settlement has not in that event provided that the portions intended for such children, so failing as to them, should be raised for

(n) 6 Ves. 499. (o) 1 Ves., sen. 208. (p) 1 Eden. 77; *id.* 85.

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the benefit of other surviving children; and in examining the settlement for the purpose of discovering the intention of the parties in this respect, it must be born in mind that the vesting of the portions did not, according to the above rule, depend in any respect upon the portions surviving the tenant for life, and, therefore, that the children whose portions were in question, would have been entitled to their portions if they had attained twenty-one years, or the other events specified had happened, although they had afterwards died in the lifetime of the tenant for life. The settlement providing for the event of children not becoming entitled to their portions in case of death under twenty-one, or the other events personal to themselves, after directing payment to those children who should attain that age after the death of the tenant for life, and not sooner, declared, " And in case any of the younger son or sons of the said *Charles Evans*, by the said *Mary Caroline* his wife, shall happen to die before he or they shall have attained his or their age or respective ages of twenty-one years, or shall happen to become an eldest or only son before he shall attain his age of twenty-one years, or if any of the daughters of the said *Charles Evans*, by the said *Mary Caroline* his wife, shall happen to die before she or they shall have attained her or their age or respective ages of twenty-one years, or have been married, or before his, her, or their portion or portions shall become vested, then and in such case the portion or portions hereinbefore provided for, all and every such younger son or sons so dying, or becoming an eldest or only son, and for all and every such daughter and daughters so dying and unmarried before his, her, or their said portion or portions shall become payable as aforesaid, shall go, survive, and accrue to the survivors and survivor of such daughters and younger sons, equally to be divided between them, and to be paid and payable at the same time and times as his, her, or their original portion or portions is or

are hereinbefore directed to be raised and paid, or shall become payable as aforesaid."

This provision is clear and unambiguous. The portions were payable, that is, became vested in each child at twenty-one, or the happening of the other events specified. But the children in question died before any of those events, and upon such death, according to the plain words of the settlement, the portions to which they would have been entitled, had they lived until such event had happened, survived to the other younger children, and from that moment such surviving children became entitled to the accrued share as much as they were to the original shares, unless there could be found in the settlement, something to show that such was not the intention of the parties, notwithstanding those plain expressions.

After providing for the further accruer of accrued shares, we find a proviso which appears to me to be of some importance; for it provides for the death of a child, leaving children, before its portion became payable, and gives to such children the portion of such deceased child. Now, as the judgment is founded upon the supposition that as survivorship or accruer was intended upon the death of a child in the lifetime of the tenant for life, it is material to observe that, in this provision, the event of the death of a child in the lifetime of the tenant for life, is in terms provided for, and if this provision be considered as a limitation or restriction upon the generality of the survivorship before given, the allusion to the death of the child in the lifetime of the tenant for life, with reference to such survivorship, is strong to show that the survivorship was not intended to be confined to a death after the death of the tenant for life.

I am aware of a difficulty which might arise upon the construction of this provision if a child had died in the lifetime of the tenant for life, after the happening of the event upon which the portion was made payable, but as

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this proviso must, I think, have reference to the clause of survivorship interposing the child of a child before its brothers and sisters, the reference to the death of a child in the lifetime of the tenant for life, tends strongly to show that the survivorship was to take place upon the happening of such an event. It was argued that the reference to that event in this clause tended to show that it was not contemplated in the clause of survivorship, as there was no such reference in that clause. But the answer to that is, that the provision as to survivorship was complete without it.

The observations made upon the provision for maintenance and for the *cesser* of the 500 years' term, do not appear to me to be of sufficient weight to justify a construction contrary to the obvious meaning of the previous provision. Those, indeed, relating to the term would have been very strong and difficult to be answered, had not the case of *Emperor v. Rolfe*, and other cases, established, that they ought not to prevail against the intention of the parties as assumed in those cases.

Much stress was laid in the argument upon the circumstance that this provision was not as usual a trust to raise a certain sum, to be divided amongst the younger children, but a particular sum for each child, so that the burden upon the estate was to depend upon the number of younger children. This may not be so provident a provision as the other, but I do not see how that affects the argument, as it is clear that there was to be a survivorship with respect to those particular sums. In the ordinary case, the sum to be raised is generally made to vary with the number of children, and in this the provision is for so many thousand pounds as there should be younger children; and although that provision would be more burdensome than the other, if there should an extraordinary number of younger children, it would probably be less so if the number should be less than the average.

The decree assumes, that all the provisions for survivor-

ship apply only to deaths of children after the determination of the estate for life, but it cannot be disputed that the portions would vest in children attaining twenty-one, or the happening of the other events specified, although the tenant for life should then be living, and the survivorship is to take place upon the death of any child before attaining twenty-one, or such other events happening, without reference to the tenancy for life, whether it is continuing or not; but if the construction assumed by the decree should be adopted, no such survivorship would take place upon the death of any child in the lifetime of the tenant for life, which would be contrary to the expressed terms of the gift.

I am, therefore, of opinion that the decree is in this respect wrong, and that the survivorship includes the shares of every child born, who, if it had lived to attain twenty-one, or till the happening of the other events specified, would have been entitled to a portion. If your Lordships should agree in the opinion which I have now expressed, I apprehend the course to be taken would be to declare that, and then refer it to the Master to make the necessary inquiries.

Lord Brougham.—I entirely agree with my noble and learned friend in the principle which, in the outset of his argument, he stated to be the rule to govern such cases as this, and also in the opinion at which he has arrived, and at which I arrived in the course of the argument; that the decree cannot in this respect be supported, for that the survivorship applies to the children who should die, whether before or after the determination of the life estate. I do not find in the argument of the very learned and able Judge, from whose decision this appeal is brought, any sufficient reason to countervail the arguments, which appear to me, both upon principle and the true construction of the settlement, and also upon the

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authority of the cases, to be entitled to govern the decision in this case. I do not find that the learned Judge has argued this case—if we are furnished with a correct note of what fell from his Honour—in such a manner as to convince me, that a judgment proceeding upon the reasons which he is said to have given, can be supported.

It is very material to consider, as my noble and learned friend has already remarked, that there is in this settlement, in express terms, a provision made for survivorship between children before the determination of the life estate. That is most material, for it shows that that was, at least in one part of the arrangement, in the contemplation—and expressed so to be—of the parties to this settlement, and that provision was accordingly made for that event happening.

I should observe, that the only ground upon which it is possible, in my opinion, to sustain this decision, and to hold that by survivorship you are here to mean only survivorship between children in being after the determination of the life estate—the only ground upon which it appears to me that this decree can be supported—is that which was most ably taken by the learned counsel for the respondent (I particularly allude to the able argument of *Mr. Humphreys*), that you have to consider the creation of the term as provided for at the beginning of the settlement, and that then the clause of accruer only disposes of that which had been called into existence by what may be termed the creative part of the settlement. But I have yet to learn that there is any such rule as this to govern the construction of such instruments; that if terms are created, you have then only to consider that what follows is to dispose of the term so created, and that you have no right to import into the first part—what I may term the creative part of the instrument or settlement—any argument derived from the dispositive part of that settlement. I have yet to learn that there is any such rule of law as

that. There clearly is not. I must take the whole together, and where it might remain doubtful, or even more than doubtful; where there might be an inclination against the construction which might afterwards arise from the dispositive part more clearly showing the meaning and intention of the parties; where an inclination might arise which might qualify the term created, it is perfectly clear that you might import into the first part, for the purpose of clearing a matter of doubt, or even of modifying the construction of that part, the clear meaning of the parties, by reflection and operation, as it were, backwards upon it, derived from the language which they have used in disposing of the term so previously created.

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In this case I hold it to be clear, that, taking the clause of accruer together with the former, you gather the meaning of the parties to the settlement. When it is said that the case of *Emperor v. Rolfe* is one of the few cases which countenance this latitude of interpretation, I cannot go along with that remark at all. In the first place, I think that *Emperor v. Rolfe* is a considerably stronger case than this. It is a stronger case than this, because there the term was only to be created after the mother's death. The term was only by the force of the settlement to come into existence and be created after the mother's death. That was therefore, properly speaking, not a term created; and Lord *Hardwicke*, though he appears to have felt that there was some difficulty in the case at first, said it would be a very harsh construction to hold the contrary, and he gave the decision which was afterwards followed in the case of *Hope v. Lord Clifden* (p). Lord *Eldon* there refers to *Emperor v. Rolfe*, and says it looks very like a new decision. It is a very ingenious, a somewhat elaborate and abundantly characteristic judgment which Lord *Eldon* gives. He does not decide the case the first day,

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but in breaking it he goes very much at length into its merits, and he very much applies himself to *Emperor v. Rolfe*. He comments upon that case, and upon *Woodcock v. The Duke of Dorset* (q), decided by Lord *Thurlow*; and he goes into the arguments of Lord *Thurlow*, and applies them to the case then before him. Lord *Thurlow* says, these words are very strong; their natural meaning is strong and difficult to manage. So Lord *Eldon* says that he felt the words before him in *Hope v. Lord Clifden* to be strong and difficult to manage; but nevertheless, considering that he is dealing with the case of parent and child, he must reckon a good deal upon the force of the natural feeling which it was likely to give rise to, and then referring to the words of Lord *Hardwick* in *Emperor v. Rolfe*, he says he thinks it would be a harsh construction to take an opposite view in the case then before him. Having gone much at large into the case, he says he should wish it might be afterwards again spoken to by the parties. He was frequently unwilling to decide in cases where he had little or no doubt, and, therefore, this wishing to have it spoken to again indicates, to those who knew that learned judge, nothing of doubt upon his mind, for he generally held by his first opinion very strongly, but it only indicates that he had a hesitation in giving out his opinion. It does not follow, to those who knew Lord *Eldon* and the character of his mind, that he had any doubt in following the cases of *Emperor v. Rolfe* and *Woodcock v. The Duke of Dorset*, but that he went entirely along with those cases, and that his mind was clearly made up from the beginning that he had put the right consideration on the settlement in the case of *Hope v. Lord Clifden*.

The authorities therefore, so far from not bearing out this view, or so far from supporting the decision of the

(q) 3 Brou. C. C., 569.

Court below in this case, or from not bearing out the reversal of it, appear to me to bear fully as strong, and even stronger, on this case than on the case of *Emperor v. Rolfe*. Having weighed, therefore, with the deference due to it, the decision of the learned Judge in the Court below, and having looked also to the plain meaning of the parties, and having regard to this, that there is no rule of law which prevents us from taking the accruer clause—or the dispositive cause, as it was called in the argument—together with the creative clause; having regard also to the leases, and to the arguments and comments used by the learned Judges in disposing of them, I have come to a very clear, and, I must say, a very unhesitating opinion, that the judgment of the Court below cannot be supported, and that it must now be altered in the manner which has been suggested.

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Lord Campbell.—I likewise agree that this alteration should take place, which has been suggested, in the decree of his Honour the Vice Chancellor. I acknowledge that I feel regret that I come to that conclusion, because I should be inclined to say with his Honour, that the good sense of the dispute seems to be with the plaintiff in the cause, that is to say, that it would probably be a more desirable arrangement of the affairs of the family, that the sum of 3,000*l.* only should be raised instead of the sum of 7,000*l.*, and I regret exceedingly that I should differ from any Judge whose judgment I have to review, particularly that I should differ in opinion from a Judge for whose learning and ability I have such profound and sincere respect as I have for those of his Honour the Vice Chancellor *Knight Bruce*. But, after having repeatedly read this settlement, and referred to the cases, I must say, that I come to the clear conclusion that the decree is, in this respect, erroneous.

It has been said truly, that Courts of Equity take con-

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siderable liberty in construing settlements with regard to the portions of younger children, but that is only in carrying into effect the probable intention of the settlor. A Court of Equity does not make a new settlement; it construes the settlement which has been made. Where it appears that the construction is at all doubtful, and that by putting one construction upon it, what must be supposed to have been the intention of the settlor will be defeated, and by putting another construction, although some violence may be done to the words, the probable intention of the settlor will be carried into effect, you will prefer the latter construction to the former. But where you cannot necessarily come to the conclusion that you defeat the intention of the settlor by putting their natural and grammatical construction upon the words, I know not that a Court of equity, any more than a Court of law, would consider itself justified in not doing so.

Now, looking at the two clauses of the settlement, which must be read together—you must read together what has been called the creating or charging clause, and the dispositive clause—I do not see that we are at all justified in wresting the natural meaning of the words, which is, that if any children shall die, whether in minority or after they have reached majority, their portion shall accrue for the benefit of the surviving children. That is clearly the natural and grammatical construction of the words. Then how are we justified in interpolating any words? The words you must interpose are, “if any of them die after reaching the age of twenty-one.” How are we justified in introducing those words into the settlement? I know that this may be considered a fantastical arrangement on the part of this settlor; it may or may not be that he might so intend; there is nothing absurd in it; there is no gross injustice that can be inflicted upon the eldest son, if it was the intention that he should have exactly the same portion, whether all the

children, all his brothers and sisters, that came into *esse* should reach twenty-one, or whether some of them should have died before reaching twenty-one. It is allowed that, if they reached twenty-one, however numerous the children might be, their portions would all be charged, and would accrue to the surviving children, if they died after twenty-one. Then, if that is so, how can I say that I am justified in interpolating the words which you must necessarily interpolate, namely, "if they shall happen to die in the lifetime of the said *Charles Evans* and *Mary Caroline*."

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Now, with the most profound respect for that learned Judge, I could have wished that, in his judgment, if we have an accurate note of it, he had given us a little more at length the reasons which influenced his mind, which I am sure would have been regarded by all the members of this House with the deepest attention. But he seems to have considered it as rather doubtful, whether the portions of these children that reached twenty-one, and died in the lifetime of the parents, could accrue; but the case of *Emperor v. Rolfe*, and that class of cases, appear entirely to dispose of that argument, and to shew quite clearly that the portions of the children who reached twenty-one, and died in the lifetime of the parents, must be considered as charged upon the estate, and must be raised for the benefit of the surviving children. If that be so, how am I to draw a distinction between the children that die in the lifetime of the parents having reached twenty-one, and those who die in the lifetime of the parents not having reached twenty-one? It seems to me to be a very arbitrary distinction, and I asked Mr. *Hodgson*, who argued this case with his usual ability, just to frame the settlement in the words which he, in his great skill, would introduce, so as to carry into effect the construction he put upon them; but he rather discreetly, I think, avoided doing that, because it would have thrown a considerable

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difficulty even upon him. He would have been obliged to introduce words applicable to children that reached twenty-one, dying in the lifetime of their parents, and other words to apply to those that died under twenty-one in the lifetime of their parents. But is not this making a new clause altogether, and not construing the clause which we find in the settlement?

Upon the whole, I come to the conclusion that, in this case, we are not justified in departing from the natural and grammatical sense of the words; and that there is no authority calling upon us to do so, because those cases to which reference has been made do not go at all beyond establishing this, that to effectuate what must be understood to be the purpose of the settlor, you will put rather a different construction upon the words than their natural meaning. But there is no case which says that you can venture to do so, unless you are sure that you are thereby effectuating what must be supposed to be the intention of the settlor. In this case, I do not at all know that the settlor did not mean what he has said, namely, *that with* regard to all children that came into *esse*, and died in minority, or whether they died after reaching majority, either in the lifetime of their parent, or after their parents died, their portions should accrue to the benefit of the surviving children. It seem to me that the view taken of it by my noble and learned friend is correct, and that the decree ought to be reversed.

Lord *Brougham*.—I ought to have observed that there is one thing which has been too much taken for granted: the right of stretching the construction in a court of equity upon this ground, that provided we can suppose that it might have been the intention of the parties to mean a thing such as living at the death or surviving A. B.; provided it is possible the parties might have meant that, we have a right to say that they meant it. That is a most arbitrary view to take.

Mr. *Turner*.—Your Lordships' declaration, I presume, will be that a sum of 1000*l.* was to be raised for each of the younger children living at the date of the settlement, and each of the younger children born afterwards, and that that sum of 1000*l.* is to be distributed among the surviving children; and that it be referred to the Master to enquire what younger children were living at the date of the settlement, and what born afterwards.

The *Lord Chancellor*.—And which of them have died, if any of them have died, and at what age they died, and whether married or not.

Mr. *Russell*.—Will your Lordships permit me to mention a circumstance which affects only the respondent, *C. B. Evans*, and which arises out of your Lordships' judgment? He filed the bill as an infant entitled to the inheritance of the estate, subject to this term, and the suit was instituted with the approbation of the Court, and with the sanction of the Master, and an amount of 8000*l.* has been charged upon the estate. Now he may die in infancy, and he has no other property. What I should submit therefore to your Lordships is this, that your Lordships will add to your declaration, that his costs of this appeal will be a charge upon the term.

The *Lord Chancellor*.—He is a tenant in tail.

Mr. *Russell*.—Yes, subject to the term. He is defending the inheritance, with the sanction of the Master, and the approbation of the Court.

The *Lord Chancellor*.—We are not sure that the term will do more than raise the portions for the younger children.

Mr. *Russell*.—Let it be subject to raising the portions.

Lord *Brougham*.—That is if there is any surplus.

Mr. *Russell*.—There is no doubt an ample surplus.

The *Lord Chancellor*.—Is he of age?

Mr. *Russell*.—No; if he was of age it would be immaterial. He is an infant about seven years of age.

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The *Lord Chancellor*.—Then I think it seems reasonable.

IT WAS ORDERED, &c., "that the decree complained of be varied in respect to the declaration therein contained; that in the events which happened, the principal sum of 3,000*l.* only became and was raiseable for the portions of the daughters and younger sons of *Charles Evans* and *Mary Caroline* his wife, under the indenture of the 8th of *February*, 1794," &c.

"And it is hereby declared, that under the said indenture a portion of 1,000*l.* was to be raised in respect of each and every younger child living at or born after the date of the said settlement, and that the portions of such of them as, being sons, died under the age of twenty-one years, or, being daughters, died under that age and unmarried, survived to the others or other of them."

"And it is further ordered, that it be referred to the Master of the Court of Chancery, &c., to enquire and certify to the said Court what daughters and younger sons of the marriage between the said *Charles Evans* and *Mary Caroline* his wife, were living at the date of the said settlement, and what daughters and younger sons were born afterwards, and which of them have died, if any of them have died, and whether married or not."

"And it is further ordered, that the costs of the appeal incurred by *Charles Barrow Evans*, the infant tenant in tail, entitled to the inheritance of the said estates, subject to the term of 500 years, created by the said indenture of 8th of *February*, 1794, be charged on the said inheritance and secured under the said term, subject to the payment of the said portions and the costs of the trustees of the said term, and any other costs that are or may become payable in respect of the said portions to any trustees or trustee, or person or persons, interested therein."

"And it is further ordered, that the said cause be remitted back to the Court of Chancery, to do therein as shall be consistent with the judgment hereby pronounced, and that on the said Master making his report to the said Court of Chancery, and on the same being duly confirmed, &c., the said Court do make such order or decree on further directions, and as to subsequent costs of the suit, as to the said Court, consistent as aforesaid, may seem meet."—*Lords' Journals*, 30th *March*, 1847.

JAMES ANDERSON BERRY	-	-	<i>Appellant.</i>	1847.
GEORGE MORSE and others	-	-	<i>Respondents.</i>	March 22.

A., by a trust settlement, gave to his son "a like sum of 5000*l.* sterling, payable, &c., after my decease, from which provision shall be deducted any sum that I have already advanced, or may still advance for him, to enable him to carry on his business." A. entered into a guarantie for 2000*l.* for the firm of which his son was a partner. A. was compelled to pay that sum, and the firm afterwards becoming bankrupt, he obtained from its assets a small dividend.

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Costs.

Held, that this was an advance to the son, which came within the description of money advanced to the son to enable him to carry on his business, and that the son could only claim the balance of the 5000*l.*, after deducting the sum thus advanced. The practice of allowing the costs in such a case to be paid out of the estate, was disregarded.

Dr. BERRY, who formerly belonged to the medical establishment at *Madras*, and on his retirement went to live in *Edinburgh*, had one son (the appellant) and three daughters. In 1825 he executed a trust disposition and deed of settlement, by which he conveyed his whole estate, heritable and movable, to the respondents, as trustees on trust, to pay each of his children the sum of 5000*l.* The bequest in favour of the appellant was in the following terms:—"And my said trustees are hereby appointed to make payment to my said son, *James A. Berry*, now residing at *Bahia*, of the like sum of 5000*l.* sterling, which shall be payable at the first *Whitsuntide* or *Martinmas* after my decease; from which provision shall be deducted any sum that I have already advanced, or may still advance for him, to enable him to carry on

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his business." Dr. *Berry* did subsequently advance the sum of 1500*l.* to the appellant; and in *November* 1826, he wrote a memorandum in the following terms:—"The sum of 1500*l.* has been paid to my son *James Anderson Berry*, in part payment of the 5000*l.* bequeathed to him in this second article of this trust deed." The appellant was a partner in the house of *M^r Farquhar, Hamilton, and Co.*, of *Liverpool* and of *Bahia*. At the solicitation of the appellant, Dr. *Berry*, in the year 1827, gave a guarantie in favour of that house to the amount of 2000*l.* This guarantie was only executed for one year. Before the expiration of that period, Dr. *Berry*, at the request of one of the partners, renewed the guarantie. It appeared that the appellant, who was at that time at *Bahia*, afterwards expressed his assent to this renewal. *M^r Farquhar and Co.* became bankrupts in 1829, and Dr. *Berry* was called on to pay the sum for which he had become responsible under the guarantie. He did pay it, and then claimed on the estate of the partnership, from which he received a dividend of 3*s.* 4*d.* in the pound, amounting to 338*l.* 6*s.* 8*d.* Dr. *Berry* died in *August* 1833, and among his papers was found a memorandum, dated *January* 1833, giving a summary of his assets. The amount paid to his son, 1500*l.*, was there stated, as were also the sums paid to his daughters in part or in full discharge of their shares as settled in the will; and there was indorsed on this paper a statement of "money lost," which set forth the sums lost, and the persons through whom they had been lost; but in this memorandum Dr. *Berry* took no notice whatever of the 2,000*l.* he had paid on the guarantie. The appellant, after his father's death, claimed payment of 3,500*l.* under the trust deed or will, relying on the paper last mentioned, as showing that his father did not intend that the money paid under the guarantie should be treated as "money advanced" to the son, and therefore to be deducted from the 5000*l.* given

by the will. The trustees, on the other hand, insisted that the 2000*l.* paid upon the guarantie, fell within the description in the will as "money advanced" for the son, "to enable him to carry on his business." The son instituted a suit in the Court of Session to have his claim declared valid; and the case came before Lord *Cuninghame*, as Lord Ordinary, who was of opinion that a cautionary engagement for a mercantile house in which the son was a partner, did not amount to an ademption of the legacy given in the will.

In a note appended to his judgment, the Lord Ordinary said, "I do not think that, according to any proper or sound construction of this clause, a cautionary engagement for a mercantile house, in which the son was a partner, can fall within it. Such an advance cannot be viewed as made peculiarly for the son, as he neither got the interest of it, nor any increased share of the profits in respect of the obligation, which he must have got had the sum been advanced peculiarly for his own behoof. Although it is probable that the circumstance of the son being a member of the company induced his father to give up the guarantie, it truly operated as much for the behoof of the other partners as of the son." This interlocutor was carried before the Lords of the First Division of the Court of Session, who reversed it. The appeal was against the reversal.

Mr. *Bethell* and Mr. *Anderson* for the appellant:—The money paid under the guarantie was not advanced to the son to enable him to carry on his business, and therefore does not fall within the words of the will. Nor was it intended by the testator to be so treated. This is shewn by several facts. In the first place the testator treated himself as a debtor of the house, and took from its general assets such satisfaction for his claim as he could get. He treated the whole affair, therefore, as one

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of ordinary business with third parties, and not as one of personal favour to his son. In the next place, the renewal of the guarantie was actually made when the son knew nothing of it; and when, therefore, the whole dealing was between the testator and a house of business in this country, without any personal interference by the son.

The principle of construction applied in *Scotland* to this kind of declaration of trust is very strict, and is in favour of the objects of the testator's bounty. *Watson v. Blair* (a). *White v. White* (b) is a strong case to shew how that rule of strictness of construction is carried out. There a father in his will made a provision for his eldest and two other sons. He declared that they should all have the same advancement; and that what any one of them owed him at the time of his decease should be imputed to satisfaction of the bequest. He afterwards purchased some heritable property, and made these sons voters; and it was held that the value of what he had so purchased was to be taken as a donation to the sons in the lifetime of the father, and was not to be imputed in payment of their shares in the succession under their father's will.

It cannot be said that this was an advance, but merely that it was a contract which resulted in debt, and not in bounty. It was a contract carried out in the usual way of business, and on which Dr. *Berry* received full legal satisfaction in his lifetime. It was not therefore an open matter at his death, and the trustees have consequently no right now to examine into it.

It does not appear what was the interest of the son under his guarantie, or whether he was in the least degree benefitted by it. Nor can it be said that it was in the terms of the will "an advance to the son to enable him to carry on his business." It was a liability incurred for a

(a) 13 Shaw & D. 12.

(b) 3 Dunl. B. & M. 468.

partnership, but there is nothing to show to what extent, if any, the son received benefit from it.

Then as to the costs. The decree gives costs against the appellant. This is erroneous. In a case like the present, the costs ought to have come out of the estate. *Morrison v. Cavin's Trustees* (c), and *The Earl of Strathmore v. Paul* (d). The practice as established by the latter case was, that the costs should come out of the estate, notwithstanding the attempt to set aside a deed by which that estate had been disposed of, was unsuccessful. This practice was there spoken of as clearly established by the law of *Scotland* (e).

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Mr. Gordon, who appeared for the respondents, was not called upon to address the House.

The Lord Chancellor.—The question is now reduced to a very narrow compass. It depends on the construction we are to give to the words of the deed, considered with reference to the evidence we possess of the nature of the original transaction. The question is, whether the sum paid by the father under this guarantie, is to be considered as a sum advanced by him to enable the son to carry on his business. It has been argued, that this is not to be considered as an advance to the son at all; that it was for the house of which the son was a partner; but that it did not bear the character intended by the father when he spoke of an advance to enable the son to carry on his business. Now what are the facts of the case? The father entered into a guarantie nominally

(c) 7 Sh. & Dunl. 810.

(d) 1 W. & S. 199; and on appeal, 1 Rob. Ap. Cas. 189-223.

(e) But the practice was there expressly recommended by Lord Brougham to be reconsidered; and the Lord Chancellor intimated his opinion to be unfavourable to the practice.

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for the house, and for the benefit of the house ; but as between the other partners and the son, the money thus advanced for the house was as much the son's money as if he had procured it from any other quarter. The father never contemplated the loss of the money. The time fixed at first in the guarantie elapsed before the money became payable. The father renewed the guarantie : he entered into no new contract, but prolonged the original contract for a year. That was for the advantage of the house, as the original guarantie had been given for the advantage of the house. The son was informed of this proceeding, and on the 18th *November*, 1828, before he received the information, he wrote to say, "In the event of my remaining here, would you remain guaranty for 1000*l.* or 2000*l.*?" That shows that he was well disposed for his father to continue the guarantie for the house, that in fact he consented to the advance to him being made in that form. In the result, the house became insolvent, and the father was obliged to pay the money. Then was not this money advanced to the son to enable him to carry on his business? I am of opinion that it was. It is the money of the father lost in the business of the son. What would be the difference between this and money advanced in the ordinary way I do not know. The money was advanced ; the father actually paid it, and paid it in order to further the object he had in view in advancing the money which was to enable the son to carry on his business. Though I do not found my opinion upon the correspondence, yet that correspondence shows that the interests of the son were considered in this advance.

Lord *Brougham*.—I entirely agree with my noble and learned friend. I am surprised to find some of the Judges in the Court below speaking of this as a question of difficulty. I cannot say that I have entertained any doubt

at all about it. I cannot agree with those who look upon this as a transaction which was intended for the benefit of the other partners alone. As between them and the son it cancelled a debt due from the son to the other partners. It was, therefore, an advance directly for the benefit of the son. Was it not money advanced to *James* for the purpose of helping him to carry on his business? No doubt it was, and no doubt it did help him to do so. In what proportion did it help him? In that in which he was liable to contribute to the general funds of the partnership. In settling the accounts between the son and the partners he would be credited with this amount. I do not found my opinion on matters *dehors* the instrument, but on the instrument itself, and my knowledge of the facts as to the advance of the money. I am entitled to know these facts, and bound to take them into consideration. The renewal of the guarantie was an act adopted by the son, and there can be no doubt that he thought that renewal would be for his benefit.

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Lord Campbell.—I am entirely of the same opinion. We have simply to see in the case what was the intention of the parties. *James* was to receive 5000*l.* of his father's property, and no more. From that gross amount was to be deducted any sum of money which the testator had advanced to him to enable him to carry on his business. Has this money been advanced with that view? Though actually paid under the second or prolonged guarantie, it is the same sum of money which was secured, with the son's full concurrence, under the first guarantie, and though the son did not at the moment know of the second guarantie, yet when he came to know of it he recognised and adopted it. Then here is a guarantie given by the father, at the request of the son, for the benefit of the son. The son would have the benefit of this money in settling the partnership accounts, and the money may, therefore, be

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truly said to have been advanced to enable the son to carry on his business. The intention of the settlor would be grievously disappointed by any other construction, for by it the son would get 7000*l.*, though by the terms of the will the benefit secured to him is expressly limited to 5000*l.* I cannot doubt as to the intention of the testator, and as to the construction to be put upon his will; and I am of opinion that the judgment of the Court below must be affirmed.

The Lord Chancellor.—As to costs being claimed out of the estate, I am of opinion that that practice is erroneous. The appellant sets up a claim to obtain from the funds of the estate more than it appears he is entitled to. I think he cannot ask to have the costs of making that claim allowed him.

The Lords concurred.

Judgment of the Court below affirmed with costs.

In the Matter of MARTIN'S Divorce Bill.

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March 9, 30.

A petitioner for a divorce bill held excused for not having brought an action for damages against the adulterer, upon the statement of his witnesses, that they did not find him until three years after the discovery of the adultery, and the petitioner was not able to pay the expenses of an action. *Action dispensed with. Lapse of time.*

A lapse of sixteen years from the adultery not made an objection to the application for divorce at the end of that time.

THE order of the day of the second reading of the bill, intituled, "An Act to dissolve the Marriage of *Robert Montgomery Martin*, Esq., with *Jane Avis Frances Martin*, his wife," &c., having been read, Mr. *Austin*, of counsel for the petitioner, opened the allegations of the bill, and said a copy of the proceedings for a divorce *à mensa et thoro* in the Ecclesiastical Court, was duly laid before their Lordships; but there was no proceeding at law, as no action was brought for the reasons which the witnesses would state. A witness having proved service of copies of the bill, and of the order of the House for the second reading of it, on Mrs. *Martin*, who was then known as Mrs. *Sheridan*, Miss *Keith*, the next witness, said she was sister to Mrs. *Martin*, and the marriage between her and Mr. *Martin* was had in *Sidney, New South Wales*, in 1826, according to the rites of the Church of *England*. They lived in that colony for about a year, and then went to *India*. They had no child. Witness came to *London* in 1833, and found Mrs. *Martin* residing in *Pimlico* with Dr. *Sheridan*, and bearing his name. They had one child, and a second was born soon afterwards. Witness did not see Mr. *Martin* from the time of his

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leaving *Sidney* until the year 1839, when he returned from *Canada*. She did not know at what time Mr. *Martin* became acquainted with the elopement of his wife. Dr. *Sheridan* was not in good circumstances. He had since then been confined on account of derangement.

Two other witnesses proved that Mr. and Mrs. *Martin* came to *England* in 1830, and lived together in *London* for about a year. Dr. *Sheridan* was then a frequent visitor to them; but there appeared nothing to excite Mr. *Martin's* suspicions. After the elopement he was half distracted. From 1832 to 1836, Dr. *Sheridan* was in embarrassed circumstances, and so was Mr. *Martin*; he went to *Hong-Kong* after that, and had but lately returned. These witnesses proved that they had for some months after the elopement, which was in 1831, searched for Dr. *Sheridan*, by the desire of Mr. *Martin*, but did not see him till 1834; he was residing in *Ebury Street, Pimlico*.

Mr. *Barron*, the solicitor for the bill, said he became acquainted with Mr. *Martin* in 1839, and was professionally concerned for him in an action brought against him in 1840; and it becoming necessary to pay into Court 200*l.* to abide a reference, which Mr. *Martin* was not able to pay, witness advanced that sum, which, with other sums, was still due to him. The reference went against Mr. *Martin*. He went to *China* in 1844, and returned in 1845. His circumstances were so bad from 1839, that he could not have paid the expenses of an action.

The bill was read a second time on the 30th of *March*, and passed this House on the 16th of *April*.

See *Coode's* and *Lardner's* divorces, Vol. 6 Clark & Finnelly, pp. 567 and 569; and *Heaviside's* divorce, 12 C. & F. 333.

JAMES GERAHTY, Esq.	- - -	<i>Appellant.</i>	1847.
JOHN ROBERT MALONE and others	-	<i>Respondents.</i>	April 19, 20, and 22.

A lessee having been evicted for non-payment of rent under the ejectment statutes in *Ireland*, an equitable mortgagee of his interest filed a bill for redemption against the landlord :—

Held, 1st, that the mortgagee was entitled, under the earliest of these statutes (11 *Anne*, c. 2), to redeem the evicted premises ; and, 2ndly, that trustees of a settlement, to whom the lease had been assigned, were not necessary parties to the suit.

Evicted Lease. Equitable Mortgagee's Right to redeem. Parties. Costs.

Although the general rule is to make the party seeking a redemption pay the costs of the suit, the Court has jurisdiction to look to the landlord's conduct, and to throw the costs on him according to its discretion.

Two fields near *Dublin*, containing about ten acres, held by *Mary Lyster* from the Archbishop of *Dublin*, were demised by her, by lease dated in 1811, to *Michael Frayne*, for twenty years, at a rent of 56*l.*, with the usual *toties quoties* covenant for renewal. This lease was made the subject of a settlement by *M. Frayne* in *February* 1823, upon the marriage of his son *John Frayne* with *Catherine Nowlan*, and the premises were thereby assigned to trustees upon trust, after *Michael Frayne's* death, to permit *John Frayne* to receive an annuity of 60*l.* for his life, and after his death, to permit the said *Catherine* and the children of the marriage, to receive the said annuity, share and share alike.

In *December* 1823 *James Gerahty* (the appellant), in whom *Mary Lyster's* interest in the premises became vested, granted a renewal of the lease to *M. Frayne* for twenty years more, upon payment of a fine of 235*l.* ; and the renewed lease also contained a *toties quoties* covenant of renewal on the part of *Gerahty*.

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Michael Frayne died in 1830, having made a will naming an executor, who renounced, whereupon his daughter, the wife of *James Gogarty*, obtained administration with the will annexed.

John Frayne received the annuity from his father's death, and died in 1834, leaving the said *Catherine* his widow, and three children by her, entitled to the annuity. She (the widow) married *Charles Duignan* in 1837.

A year's rent having become due in *March* 1838 to *Mr. Gerahty*, he brought ejectment, and having recovered judgment, was put into possession of the premises. In 1839 *John Robert Malone* (the respondent), upon application from *Michael Frayne, jun.*, one of the trustees of the settlement of *December* 1823 (and who was a son of the said *Michael Frayne*, deceased), paid *Mr. Gerahty* 85*l.* 1*s.* 6*d.* for rent and costs, in redemption of the premises, and obtained from the said trustee a deposit of the leases of 1811 and 1823, as security for repayment of the said sum. The rent having been afterwards allowed to fall a year in arrear, the appellant again brought ejectment, and got judgment, and executed his *habere* in *May* 1840. *Malone* again proposed to redeem, and he made a tender of 120*l.* for the full rent and costs. The appellant declined to accept the money unless the consent of *Mrs. Duignan* (widow of *John Frayne*) was obtained, which being then obtained, the appellant required also to have a written declaration from *Malone* and her, with the consent of *Charles Duignan*, her husband, that the redemption was for the benefit of her and her children by *J. Frayne*. Some further negotiation took place between the parties, but without any result.

Under these circumstances, a bill for redemption was filed in the Court of Chancery, in *Ireland*, by *Malone*, as equitable mortgagee, and by *Mrs. Duignan* and her children by *John Frayne*, infants, by *Malone*, as their

next friend, against the appellant. *Charles Duignan* and *Mrs. Gogarty* and her husband were made defendants. The trustees of the settlement of 1823 were not made parties. *Malone* paid 130*l.* into Court to answer the redemption money and costs.

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The cause was heard and reheard, in 1843, by Sir *Edward Sugden*, Lord Chancellor of *Ireland*, who, after full consideration of all the circumstances, decreed for redemption, and ordered the appellant (the landlord) to pay the costs of the suit (a).

The landlord appealed against that decree.

Mr. *Gerahty*, the appellant, and Mr. *Edward Gerahty* (both of the *Irish* bar), were heard for two days and part of a third, in support of the appeal. Their arguments were to this effect:—

The decree is contrary to the express provisions of the *Irish Act*, 8 *Geo. I.*, c. 2, and to the uniform course of proceedings in *Ireland* regarding mortgagees of leasehold interests, their liability to ejectment for non-payment of rent, and the corresponding rights of redemption. The bill sought to create a charge by mere deposit of the lease, which was previously conveyed by the marriage settlement of 1823, whereby the whole beneficial and legal interest in the then unexpired residue of the term was vested in the trustees to the uses of the marriage, and no conveyance from them to the respondent *Malone* ever existed, nor was any privity or connection with the term alleged by him. His case was a mere parol transaction with *Frayne*, jun., one of the trustees, at whose request, and for whose personal advantage, and not for the advantage of the widow and children of *John Frayne*, the respondent advanced the money. The set-

(a) The case is fully reported in 3 *Dru. & War.* 239; and also in 5 *Ir. Eq. Rep.* 549.

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tlement being deposited with the respondent, he was informed by it of the extent of the term, of the trustees to whom, and of the uses for which, it was assigned; and yet, with such knowledge, he, a stranger to the term, filed his bill to redeem against the reversioner, who was re-possessed of the lands, by force of the ejectment under the statutes. The respondent's case was not to be compared to those of *Moore v. Choat* (b), and *Robinson v. Rosher* (c), cited in the Court below; for in them the contracts of deposit were in writing, but in this case there was no writing, and no dealing at all with the parties who had power to encumber the term. The respondent was not even an equitable mortgagee of the term, nor had he any interest in the term, nor possession for a moment under any title. The Act 11 *Anne*, c. 2, expressly exempted from proceedings in ejectment all mortgagees of leases, not in possession. The first decision establishing a mortgage by deposit of deeds, made by Lord *Thurlow* in 1785, as stated by Lord *Eldon* in *Ex parte Mountfort* (d), was a surprise on the profession and a departure from the statute. The fourth section of the Act 11 *Anne*, c. 2, "that in case said lessee or assignee, or other person claiming any right, title, or interest in law or in equity, of, in, or to the said lease, should, within the time aforesaid, file a bill for relief in equity, such person should not have or continue any injunction against the proceeding in such ejectment, unless within forty days after a full answer by lessor, he should bring into Court such sum of money as the lessor should set forth in his answer to be due," was, in this case, entirely misapprehended; it applied to the previously existing inconvenience of filing bills after ejectment brought and before judgment, and obtaining injunctions on pretence of equity to prevent the lessor from

(b) 8 Sim. 508.

(d) 14 Ves. 606.

(c) 1 Younge & Col. C. C. 9.

recovering possession. The fourth section was a restraining and not an enabling clause, and, at all events, it had no bearing on a state of things after judgment and execution thereon, as in the present case. The right to file a bill to redeem after judgment, was annexed to the class of persons previously enumerated—persons who were ejected and had the right to redeem; and that enumeration did not comprise any person in the position of the respondent, nor was he in the least aided by the amending and explaining acts of 4 *Geo. I.*, c. 5, and 8 *Geo. I.*, c. 2 (*Irish*), which last act, by the fourth section, expressly empowers mortgagees and assignees of leases to redeem in the circumstances there mentioned. But the sixth section requires all mortgages and assignments of leases to be registered within six months. The mortgage alleged in this case by deposit of deeds only, was incapable of registration, and does not therefore fall within the provisions of the act, whose positive enactments, however, have, since 1721, regulated all mortgages of leases in *Ireland* in respect to ejectments for non-payment of rent. This and the two preceding statutes on the subject were fully considered and applied by this House in the case of *O'Reilly v. Featherstone* (e).

The Lord Chancellor of *Ireland* seems himself to have apprehended that, in his judgment in this case, he was running counter to the statutes, for he laboured to establish a jurisdiction in the Court wholly independent of the statutes (f). But the statutes passed in *Ireland*, viz., 11 *Anne*, c. 2; 4 *Geo. I.*, c. 5; 8 *Geo. I.*, c. 2; 5 *Geo. II.*, c. 4; 25 *Geo. II.*, c. 13; and 17 *Geo. III.*, c. 27, relating to ejectments for non-payment of rent, with successive amendments for pursuing and improving the ejectment remedy, being all *in pari materia*, are to be considered as one code, or different clauses of one law, in exclusion of all original anterior jurisdiction. The constitution of these

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(e) 2 Dow & Clark, 39.

(f) See 3 Dru. & W., p. 264.

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connected acts, therefore, contains every rule to be observed on the subject; and there is not a case reported, where several statutes on the same subject and of mutual dependence, all introductory of new legislation, however varying from prior usages, have been brought under the consideration of the Court, in which such combination of legislative acts has not been taken to shut out the common law and all prior rules, and to furnish the Judges with exclusive rules and principles for their administration. The express connection of these *Irish* statutes, and their remedial character, have been uniformly recognised in every case which has occurred since their enactment; and it has been an universally accepted conclusion, from this series of statutes, that they did not contemplate the continuance of any former jurisdiction. In the case of a single statute, from shortness and imperfection in its construction, there may be ground afterwards to resort to anterior rights and usages as still allowed to prevail, either as not being recognized, or not expressly taken away by such statute; but no such inference appears ever to have been assumed where the subject has been regulated by several acts of Parliament. And even a single act introducing new legislation has been generally considered as an entire substitution for all ancient rules and usages. All the argument used in this case, in search of a jurisdiction, beyond the acts of Parliament, is taken, not from any decision on the statute of *Anne*, but from supposed decisions on the subsequent statute of 8 *Geo. I.*, which leaves no room for doubt or argument; and it is extraordinary that in so referring to decisions on this statute, and dilating upon them, the statute itself was passed by, in the cause in hand, and no case, report, entry, pleading, or record of any kind, was referred to, to support this mode of dealing with the statute. The uniform rule on these statutes since their commencement, has never brought into doubt, that the right to file a bill for

redemption, within six months from the eviction of the lease by ejectment, belongs exclusively to the class of persons enumerated in the statute of 11 *Anne*, c. 2, as liable to eviction in the ejectment suit. Before the present suit, it was never known in *Ireland* that a person who never had possession, and never was ejected—who never was tenant, and could not be ejected, a perfect stranger to the landlord—ever made such claim; and since the enacting of these statutes in *Ireland*, and of the 4 *Geo. II.* in *England*, no case has occurred in either country of relief having been administered to any suitor from proceedings in ejectment for non-payment of rent, but under the express enactments of the statutes themselves, and in execution of their provisions: and it is alleged in the bill in this case, that the tender made to the appellant in 1840, was “to redeem the premises according to the provisions of the acts of Parliament in force in *Ireland* relating to ejectments for non-payment of rent.”

The respondent had been acting in concert with the trustee, *Frayne*, to exclude the widow and children of *John Frayne* from all benefit in the lease, and it was by his having obtained an improper influence over them that they consented to his being their next friend in the suit:—

[The *Lord Chancellor*.—That question cannot be raised now, between co-plaintiffs.]

There certainly was a misjoinder of parties and a conflict of interests. On the very statement in the bill, *Malone* had an interest entirely adverse to the other plaintiffs: he sought to establish a demand which would have priority over the annuity payable under the settlement, and without the sanction of the trustees; and moreover, when the notices, proved in the cause to have been served on *Malone*, offered him redemption on the terms of his declaring in writing a trust for the uses of the marriage settlement, he refused to comply with such requisition. There was plainly an opposition of inte-

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rests and misjoinder of plaintiffs in this suit; and it was also to be observed, that *Malone* assumed to be next friend to the married woman, Mrs. *Duignan*, who had no distinct interest, whose husband was made a defendant, as being entitled during the coverture to the annuity provided for her by the settlement. It appears from the deposition of the witness *Campion*, that it was by his urgency that *Malone* was induced to make the advance of money; that he had no acquaintance with the widow and children of *John Frayne*; that his assuming to be their next friend was a mere pretence. When the insolvency of *M. Frayne*, the trustee, rendered it hopeless that he should repay *Malone*, then this suit was resorted to by *Campion*, who became the solicitor and witness for *Malone* under the pretence that *Malone* was a mortgagee by deposit of deeds, although without any one incident to such transaction; and, by these means, to seek repayment at the landlord's expense. This was the whole object of the suit. *M. Frayne*, the insolvent, was the only person who appeared to defend the ejectment.

But, supposing *Malone* was a mortgagee, and that the suit instituted by him for redemption was free from the objections before taken, it was still to be observed that there was a defect of parties, because the trustees of the settlement of 1823, to whom the term and its beneficial interest were conveyed for the uses of the marriage—although the interest so vested in them was to be charged with this supposed demand of *Malone's*—were not before the Court; that *M. Frayne* (who was one of them), as the person for whose use the money was stated to have been advanced, and who could give some account of the transaction, being alleged to have been the mortgagor, was not made a party, neither as mortgagor in that alleged dealing, nor as the person who had the actual possession of the premises when the writ of *habere* was executed, and therefore entitled to be restored in case of redemption.

It appeared from the notices served on the respondent that the term had expired in 1843, before the final judgment. The plaintiff below took no steps in the cause until the appellant applied by motion for leave to appeal:—

[The *Lord Chancellor*,—being informed by Mr. *Humphry* (of counsel for the respondents), that the documents just referred to were not noticed in the decree,—said they could not, therefore, be referred to. This House had to see whether the decree was right, but not whether the cause was properly managed. Any document or evidence that was before the Court below might be properly brought before the notice of the House, but no others.]

It was in evidence below that redemption was offered to all the parties that were entitled to redeem, but they all declined the offer because they had no interest worth redeeming, the lease having expired.

Under any circumstances the decree was erroneous in throwing the costs of the plaintiffs and of the defendant, Mrs. *Gogarty*, on the appellant. By the special provisions of the acts of Parliament before referred to, the appellant, as landlord, was entitled to his costs on redemption. The facts of the case did not justify the Lord Chancellor in overlooking the fixed rule of the Court, and depriving the appellant of his right to costs.

Mr. *Humphry*, for the respondents, was not called on.

The *Lord Chancellor*.—During the time this case has been in hearing—not entirely three days—we have had the opportunity of considering the judgment of the Lord Chancellor of *Ireland*, and the arguments and authorities; and I have not been able, either from the arguments or otherwise, to entertain the least doubt of the propriety of the judgment. The plaintiffs were *John Robert Malone* and *Catherine Duignan*, and her children by her former husband, *Frayne*. She was entitled to sue as interested in an annuity of 60*l.*; which gives her an interest in the lands

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giving her to relief. The title of *Malone*, as mortgagee, is clear, so far as it is necessary for maintaining this suit. The original lessee remained, under the settlement, seized of the lease to use his best endeavours to obtain a renewal, to give effect to the settlement; and it being afterwards necessary to renew, a renewal was applied for and granted to him by the appellant. The rent not being paid, the appellant, the landlord, seized and obtained possession. *Malone* then advanced the necessary money to pay the landlord, and received the title deeds, creating an equitable interest, as a security for repayment of the money advanced. There is an exhibit showing that the transaction was recognized by the widow as well as her trustee, and containing an undertaking to execute a mortgage. Such execution was not necessary, for there was a deposit of title deeds. *Malone* is therefore in the situation of a party having an equitable interest. The act of 11 *Anne* expressly provides for this; it provides for legal and equitable interests. The right to redeem given by that act has never been taken away by any subsequent statute. It was, therefore, quite right to associate *Malone* in a suit, the object of which was to obtain the benefit of the lease from the landlord. If he was not plaintiff, he must have been made defendant, for he was interested in the lease. The title, therefore, of the plaintiffs to sue is clear. The Lord Chancellor did not at first entertain any doubt, but he seemed to be pressed by the counsel at the bar upon the supposed difference between the practice in *Ireland* and in this country. He, therefore, very properly, delayed giving judgment, and took time to consider it. On rehearing the case he gave the matter great attention, and came to the same conclusion as on the former hearing. The statute of 11 *Anne*, c. 2, s. 4, clearly gives a right of redemption to an equitable mortgagee, the words of that section giving the right "to any person claiming any right, title, or interest in law or in equity, of, in, or to the said lease." These plaintiffs

have an interest in the lease as against the landlord, and are entitled to redeem on paying the rent and costs up to the date of the tender of them to the appellant.

It is said that it was contrary to the rules of the court to give costs of the suit for redemption against the landlord, and that it was from a sense of that injustice that the petition of rehearing was dismissed without costs. It cannot be contended that whatever course the landlord may pursue, he is not to be made to pay costs. There is no rule of practice to justify this. The tenant was right, and all the expense had been occasioned by the landlord. Under these circumstances I cannot doubt that the Court below was right in giving the costs against the landlord.

There was also an objection taken on the ground of the absence of the trustees of the settlement, but they were not trustees of the legal estate, and the Court had before it all parties who were necessary.

There was likewise an objection taken to the course of the hearing below, but that too was without foundation. The judgment must therefore be affirmed.

Lord Brougham.—This case was very carefully considered by the Lord Chancellor of *Ireland*, not that he entertained any doubt, but being pressed by the argument that the practice in *Ireland* was different from that of this country, he properly used more circumspection where a legal title was affected. Thus, at the first hearing, and when the case was before him for the second time, when he was able to consider it further, he said he would not part with the case until a subsequent period; but at the same time, when the case was on rehearing, he stated his reasons, and all he subsequently said was to refer to these as his judgment, unless he should afterwards find any reason to differ from them. He, therefore, at the final consideration of the case, only stated shortly that there was no precedent found after a search which he directed,

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and, consequently, that his former judgment, with the reasons, was to stand. Both with the reasons and the judgment I am well satisfied. Several arguments were urged below which were not urged here, and which could not be maintained at all.

His Lordship referred to the acts requiring registration of deeds in *Ireland*, and said the requirement of registration applied only to those matters which were capable of registry. The statute of 11 *Anne*, c. 2, had not been repealed by the subsequent acts on the same subject, it had only been extended. The statute of *Anne* contemplated equitable interests; it was as strong as words could be. (His Lordship read part of the fourth section.)

As to the matter of costs; an act of Parliament certainly might throw costs on any body, though a stranger, but to establish this it would be necessary to show it was clearly so intended. Such a case would be a little stronger than this contended for at the bar. The legislature might do an act like this, but unless it can be shown clearly that the legislature has so done, common justice, and common charity to the legislature, oblige us to assume that the legislature has not done so.

I am clearly of opinion that the judgment below is quite right on all the points, and so thinking I suggested to the Lord Chancellor that it was superfluous to hear the other side. The appeal must be dismissed, with costs.

Mr. *Gerahty*.—The term is gone, the lease having expired:—

The *Lord Chancellor*.—That is immaterial.

Mr. *Gerahty*.—There is a fund in Court as to the costs.

The *Lord Chancellor*.—Any application arising out of the judgment must be made to the Court below. We are only trying the propriety of the decree.

The decree was then affirmed, and the appeal dismissed with costs.

ANN WILLOX and another	-	-	<i>Appellants.</i>	1847.
ISABELLA FARRELL	-	-	<i>Respondent.</i>	May 6, 20, 31.

To render a person incompetent in the Scotch courts to be a witness, he must have a direct and immediate interest in the result of the suit in which he is called to give evidence, or he must be able to give the verdict in that suit in evidence in his own favour in another proceeding.

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An interest in the result of a suit, which is to render a person incompetent to be a witness, must be an interest of a substantial nature, and it must be the direct and necessary result of the suit.

The law was the same in *England* and *Scotland* upon this point previous to the passing of the 6 & 7 Vict., c. 85.

—♦—

THIS was an appeal against an interlocutor of the Lords of the First Division of the Court of Session, by which they disallowed a bill of exceptions, presented by the appellants against a decision of Lord *Robertson*, pronounced by him in the course of a jury trial.

Alexander Wood, of *Woodburnden* in *Kincardineshire*, died, in *September* 1844, intestate. The respondent claimed to be nearest lawful heir to the intestate, as being a grand-daughter of a sister of *James Wood*, his father, and she caused herself to be served heir accordingly. To this service there was a regular retour, declaring her, in the usual manner, to be the nearest lawful heir to the intestate. The appellants instituted a suit to reduce this service and retour, and claimed to be nearest heirs to the intestate, as being the grand-daughters of *George Wood*, a brother of the said *James Wood*. A record was made up to try the question of pedigree thus raised, and the issue framed was, whether the appellants' ancestor, *George*

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Wood, was or was not the brother of the said *James Wood*. If that question should be answered in the affirmative, then the appellants were, as descended from an uncle of the deceased, next heirs, and would be, as to his real estates, preferred to the respondent, who was descended from his aunt. In the course of the trial the appellants tendered as a witness *Elizabeth Wood*, their own paternal aunt. The respondent objected to the admissibility of this witness, on the ground that she had an interest in the issue of the cause, for if her evidence should establish the appellants' pedigree, she would thereby prove herself entitled to a share in the personal succession to the deceased. The Lord Ordinary refused to receive the evidence of the proposed witness. The objection was not made on the old ground of relationship, the law on that subject having been altered by the 3 & 4 Vict., c. 59, but upon the ground of interest, and was thus set forth in the bill of exceptions. The counsel for the respondent "objected to the admissibility of the said *Elizabeth Wood*, on the ground of interest, in respect that, if the appellants succeed in proving themselves heirs, the witness is one of the next of kin, and has an interest in the succession. The counsel for the appellants did not deny that in this view she would be one of the next of kin, but they denied that the proposed witness had interest in the issue in this cause, and, therefore, insisted that she ought to be received." This exception having been brought under the consideration of the Judges of the First Division of the Court of Session, the decision of the Lord Ordinary was confirmed by a majority of the Judges, consisting of the Lord Justice General, and Lords *Mackenzie* and *Fulleton*. Lord *Jeffrey* dissented. The case was then brought up, by appeal, to this house.

Mr. *Wortley* for the appellants :

The proposed witness was improperly rejected. This

was not a proceeding which concerned her interest, nor could she be directly benefited by the result. It was a proceeding to impeach the validity of a service of heir, and the truth of the retour to that service; Mrs. *Elizabeth Wood*, could not claim as heir, and was neither benefited nor injured by the return to the service, which set up the title of heir in the respondent. She had, therefore, no interest in the suit, and was consequently admissible as a witness.

The judgment in the suit could not be given in evidence in her favour, or against her, for the suit related to the real estate of the deceased, to which it was not pretended that she had or could have any title.

The interest alleged on the other side, as affecting her admissibility, is too remote to be the ground of a legal decision. It merely amounts to this, that in a possible suit, to be instituted by her for the recovery of a share of the personal estate of the deceased, the fact that the issue in which she was called as a witness had been decided unfavourably for the respondent, and favourably for the appellants, to whom she was related as aunt, might operate to her advantage. This interest is not direct and immediate, which it ought to be, in order to disqualify this person as a witness (a). The same rule existed before the late statute, both in *England* and in *Scotland*; *Ralston v. Rowatt* (b). That rule is, that the objection must be founded on an interest, not merely in the question under discussion, but in the event of the suit itself; *Bent v. Baker* (c). The rule there laid down, has been acted on from that day to the present, *Starkie* (d) and *Phillips* (e). Here the witness could not be benefited by the

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(a) Tait's Evidence, p. 349,
edit. 1834; Stair, bk. iv. tit.
43, s. 7; Bell's Principles, ss.
2245, 2248.

(b) 1 Clark & Fin. 424.

(c) 3 Term Rep. 27.
(d) 1 Stark. on Evidence, 19.
Edit. 1842.
(e) Vol. i. p. 19.

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result of the cause; could not give the verdict and judgment in evidence in her favour upon another occasion; and had nothing more than a contingent interest in the question, and that, too, of a doubtful kind. Her testimony in this suit was therefore admissible, and the judgment of the Court below must be reversed.

Sir *F. Kelly* and Mr. *Robertson* (Mr. *James Anderson* was with them) for the respondent.

The object of the rules of evidence has, up to a very recent period, been directed to secure true testimony, by excluding witnesses who have a direct and personal bias operating on their minds. Generally speaking, it may be true that the rules of evidence are alike in *England* and in *Scotland*, but that proposition is not universally true, and was not so at the time when it was supposed to be so laid down in this House, for at that very moment the law of *Scotland* excluded from the witness box persons in a certain degree of propinquity to either of the parties in the suit, an exclusion wholly unknown to the law of *England*. Besides which, there is this distinction between the two cases—that in *Ralston v. Rowatt*, the proposed witness was called in a suit which, whatever might be its decision, was opposed to his interests, and must be got rid of before his claim could be enforced. Admitting, therefore, most fully the authority of that case, it may be contended that it does not govern the present.

The proposed witness had a direct interest in this case. If she could get rid of the heirship of the respondent, by which the respondent was to get the real estate of the deceased, she would, by the very same evidence, remove a bar to her own claim of relationship as one of his next of kin, and thereby sustain her own claim to a share of the personalty. So long as the retour, finding the respondent to be the heir to the deceased, was allowed to stand, there was an insuperable bar to the witness obtaining any part

of the personalty, and she had, therefore, a very strong interest to induce her to give evidence that would have the effect of annulling the service and the retour. She may, therefore, be said to have had an interest in the event of the very suit in which she was called as a witness. It was her interest to get rid of the service and retour ; when they were out of the way, and not till then, she might hope to put in her claim. This is a sufficient interest to exclude her testimony—

[Lord *Brougham*.—That is but a contingent interest ; must it not be a direct interest in the event of the suit itself ? A man who had executed a deed might have an interest in getting rid of a witness who had attested it, but would that prevent such a man from giving evidence on an indictment for felony preferred against that attesting witness ?]

The case supposed is hardly a test for the present. Here the interest of the witness is not to get rid of one of the means by which a possible liability may be enforced against her, but to get rid of an obstacle to her own claims, and at the same time to give a great degree of force, if not absolute conclusiveness, to those claims themselves.

The verdict on this issue might afterwards be given in evidence in favour of the person on whose evidence it was obtained. Suppose she had instituted a suit for her share of the personal assets of the deceased, the service and retour might be set up as obstacles to the success of her claim ; these she would dispose of by showing the judgment which had declared them erroneous, and set them aside. She would then only have to prove her relationship to the person deceased, a proof which she had already given when called as a witness for the appellants, and in this way she would, by her own evidence, make out her own title to a share of the personalty.

Considerations such as these influenced the Court of Session in a case decided not long since, and which, it is submitted, is a direct authority in favour of the present

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decision. That is the case of *Watson v. Watson* (f). There a person tendered as a witness on an issue of propinquity, was objected to on the ground that she would thereby prove herself next of kin to the deceased, and so show herself entitled to her share of the personal estate. The same answer was made there as here, namely, that the verdict in that issue could not be used by the proposed witness in her own favour in any future proceeding, but that she must make out her title by other means. The Lord Ordinary held the person tendered to be incompetent as a witness, and the Court of Session, on bill of exceptions to this direction, confirmed it. The law in *Scotland* is, therefore, clear on this point. And when it is considered that in *Scotland* it is a presumption of law, that where a verdict is in accordance with the evidence of a witness, such verdict must be considered to have passed on that evidence, there can be no doubt that the decision in *Watson v. Watson* was correct. It is submitted that the *Scotch* law alone must be consulted on this case, and that the *English* decisions are not of authority upon it, and consequently that, in accordance with the decision just quoted, the judgment of the Court below must be affirmed.

Mr. *Wortley*, in reply, contended that the rule of law had been authoritatively laid down by this House in *Ralston v. Rowatt*, and that the case of *Watson v. Watson* being inconsistent with that decision, it was erroneous, and could not form any justification for the judgment now the subject of appeal.


May 31. The *Lord Chancellor*,—after stating the circumstances of the case, said,—The question now is, whether the witness stood in such a situation as to make her incompetent to be examined upon the issue which had been directed.

(f) 15 Dunl. & B.'s, Cases in the Court of Session, 753; 12 Fac. Coll. 719; 9 Scottish Jurist, 357.

If the *Scotch* law upon this subject was the same as the law of *England*, the point would not require much argument, because it is quite clear that the result of the trial of the issue could not directly affect the interests of the witness, the issue to be tried being, whether the pursuers were the nearest heirs of the deceased. The only way in which the witness can be connected with the property is, that in the event of a certain pedigree being established, she will be entitled to a share of the personal property.

We had several cases referred to, and there is one to which I am particularly anxious to call your Lordships' attention, because it seems to me that, even if it is not directly applicable in point of fact, it clearly establishes the principle upon which this case ought to be disposed of. I mean the case of *Ralston v. Rowatt* (g), which came to this House from the Court of Session. There the suit was instituted for the purpose of reducing a deed of settlement on the ground of deathbed by persons claiming to be heirs. A witness was called, who stated that the pursuer was not heir, but that he, the witness, was heir, upon which the objection was taken, that he could not be examined, and that objection prevailed in the Court of Session, but the judgment of that Court was reversed when the case came to this House.

When the case came here, the opinion of this House assumed that, upon a subject of this sort, there was no distinction between the law of *Scotland* and the law of *England*. It would, indeed, be very strange if there could be any such distinction, for the rules of evidence are not mere matters of local practice, but are rules adopted for the purpose of better ascertaining the truth upon subjects under investigation in courts of law, and I see that in the opinions of the learned Judges in the Court of Session, both in that case and the present, they, in arguing upon

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(g) 1 Clark & Finnelly, 424.

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the law, refer to *English* authorities, and that all of them, whichever view they take, recognise the principle that the same rule of evidence is operative, and ought to prevail in the two countries, I mean so far as regards the question under discussion, how far a witness is incompetent on the ground of interest. If that is so, it would lead to the clear conclusion that there certainly can be no objection to the admissibility of this witness upon the ground of interest, for no such objection would exist against her in this country. I am not now speaking of the late act of Parliament, but of the law as it stood anterior to that act, the act itself not being applicable to *Scotland*.

In order to see how far this question of interest applies to this witness, we must consider what the course of proceeding was in which the witness was called. The suit being a suit to reduce the service of the party claiming as heir, as a preliminary step ; not for the purpose of deciding the question, but for the purpose of ascertaining whether the appellants were in a situation to raise the question at all, an issue was directed to inquire whether the appellants are, or are not heirs, that is to say, whether they were in a situation to entitle them to challenge the service obtained by the respondent. I have before said, that the result of that trial could not by possibility be used for or against this witness, she having nothing to do with the heirship, though she might ultimately appear entitled to claim a share in the personalty of the intestate, on account of the pedigree on which the appellants sue in this action being the same as that which would entitle the witness to set up that claim. It is not attempted in argument to show that the result of the trial of that issue, in which the witness was proposed to be examined, could be used directly for or against her, but the argument stands thus : although the result of that trial could not be used directly for or against the witness, it would lead probably, and perhaps certainly, to this result in the suit itself, it would

reduce the service of the respondent, and though that would not at once operate for or against the witness, it might come circuitously into operation for the witness in this way ; if, after the service had been reduced, the witness should institute a suit under a different jurisdiction for the purpose of establishing her kin to the deceased, so as to entitle her to a portion of the personalty, that would raise a question as to the pedigree under which she claimed being the same as that under which the appellants in this issue claimed. Then, it is said, if she sought to establish her title, it is clear that though this would not be direct evidence for her in proof of her own case, yet, should the service and retour, obtained by the respondent be produced as evidence to rebut the pedigree under which she claimed, she might, in order to get rid of the effect of that retour, produce the judgment obtained in the suit in which the issue had been directed. So that the result is that the effect of the verdict which might be obtained, if it should be obtained by means of the evidence tendered, or, at least, which the evidence tendered would contribute to obtain, would be ultimately and circuitously to make the testimony of this person a piece of evidence available for her own benefit, which, when the original service stood, it could not by possibility be. It is quite clear that that is not a species of interest which would prevent this person from being a competent witness. But then we are referred to the case of *Watson v. Watson* (h), which, it is said, raises very much the same question. I do not enter into that case ; it is a very recent decision of the Court of Session, and if the Court of Session has in this instance come to an erroneous conclusion in one case, there is not much wonder that it should have come to a similar conclusion in a case which occurred but a very few years

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(h) 15 Dunl. & B.'s, Cas. in the Court of Session, 753 ; 12 Fac. Coll. 719 ; 9 Scottish Jurist, 357.

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antecedently. In fact the conclusion to which the Judges in the Court of Session came in *Watson v. Watson* has probably led to the very error into which they have fallen in the judgment upon which we have now to pronounce our opinion. The case of *Watson v. Watson* is not a case of sufficient standing to show that the law of Scotland upon this subject is different from the law of *England*. But, with respect to the other case, that of *Ralston v. Rowatt* (i), I think that we are bound by the principles laid down there, from which I have no disposition to depart, and which places the law of *Scotland* on the same footing as the law of *England* in a matter of this sort as to incompetency of witnesses upon the ground of interest. If there was any balance between the two cases, the decision in the case of *Ralston v. Rowatt*, being a decision of this House, reversing a decision of the Court of Session, which involved the same objection as the present, would settle the question; and, therefore, I cannot think that the case of *Watson v. Watson*, which was relied upon by the Court of Session, ought to induce your Lordships to depart from the principle laid down in *Ralston v. Rowatt*, which establishes the principle necessary to decide this case, and declares that the law which prevails in this country upon the subject is also applicable to *Scotland*.

I therefore move your Lordships, that the judgment of the Court of Session be reversed, and that a new trial be directed.

Lord *Brougham*.—I am of the same opinion. It appears to me that the Judges in the Court below have been misled, partly by the case of *Watson v. Watson*, and partly by their Lordships not having formed a perfectly clear and accurate notion of the objection of interest in the question, as distinguished from interest in the

(i) 1 Clark & Finnelly, 424.

result, which ought to exclude, and in *England* would have excluded, a witness prior to Lord *Denman's* late Act (6 & 7 Vict., c. 85), and which in *Scotland* is still an objection to the competency of a witness.

When I say that the Judges did not seem to me to have formed a perfectly clear notion of the objection raised, I go upon this, that the three learned Lords who chiefly refer to the case of *Watson v. Watson*, and even Lord *Jeffrey* (though he differed from the judgment of the rest), all consider, that, but for that case, it would have been a question of difficulty. I see no difficulty in it whatever. When I use that expression, my meaning is this :—The interest must be not only in the result, in the event of the trial of what their Lordships call the issue of the cause (and not simply an interest in the question), but it must be a direct and immediate interest; and it will not do to say that it removes out of the way, in another case which may probably arise, or may not, a difficulty at that time in the way of the party. That is not an interest which disqualifies a witness. It must be such a direct and immediate interest, that he may be said to be swearing for himself, or swearing against an adversary to himself, in any evidence which he gives.

The case which I put to the learned counsel in the course of the argument, I do not think was got rid of by observation at all. The argument here is, that the propinquity of the party giving the evidence might come in question in another suit, possibly in another Court, touching the personalty, and, therefore, if the witness objected to, and upon whose evidence the question arose, gave evidence one way, namely, against the service, the result would be, that the service could no longer be given in evidence against her claim in the other suit; consequently, it was said that she had an interest in giving evidence against the service, inasmuch as she was removing, by her testimony, a possible obstacle out of her way in a possible

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suit which she might maintain elsewhere, or in another Court, and *alio intuitu*, this being a suit respecting heirship, that being one respecting personal estate.

Nothing can be more clear than that a party may have an interest in getting rid of a witness, as well as in getting rid of documentary evidence, or a legal proceeding, such as a service and retour. If I am the obligor in a bond, and A. B. is the attesting witness to that bond, and there is no other witness, and it is a bond under twenty years old, and consequently must be proved by the testimony of a living witness, nothing can be more clear than that I should have an interest in disqualifying A. B. as a witness. Now, before the late act of Lord *Denman*, which is an excellent remedial act, and which removes the objection to the competency of a witness arising from a conviction for felony, nothing can be more clear than that, prior to that act, if A. B. had been convicted of felony, he could not be examined as a witness to prove any thing, even the execution of the bond. Suppose I had been called as a witness upon the indictment of A. B. for felony; can any body suppose that I could not have been examined as a witness, because the bond was produced in order to prove that he was an attesting witness, and that, therefore, I had a direct interest in removing him out of the way? "No," the Court would have answered; "this is an indictment for felony, and that question is a totally different one; it is a question respecting the possible interest which you may have in removing out of your way an instrument which is capable of being given in evidence against you. No such remote, possible, or contingent interest can be allowed to satisfy the demand of the law, which requires a direct, immediate, and certain interest in the party sought to be disqualified thereby."

The case of *Watson v. Watson* occurred in the year 1837, and their Lordships in the Court below seem to have been very much moved by that case. In the Court

below they seem to have considered themselves bound by it, but coming before us, we are not bound by it. Besides which, there is the other case of *Ralston v. Rowatt*, which is much stronger in favour of receiving the evidence, and against the conclusion at which their Lordships have arrived, than that of *Watson v. Watson* was for rejecting the evidence, and in support of their conclusion. The two cases cannot stand together. *Ralston v. Rowatt* is material, as showing not only what the *English* law would be upon this subject, but it is most material to show that there was no difference between the two systems of jurisprudence in this respect, because the *English* law principles were recognized in that case fully and conclusively.

But there is also another ground, besides the argument stated by my noble and learned friend—it is not a matter of positive law, but it arises from the old and long established rules as to the reception or rejection of evidence which governed in this country—there is another reason for saying that the *Scotch* law is very much the same as the *English* law in this respect. When we look to old authorities in both systems of law—to *Stair* and to *Bracton*—we find that they adopt, almost in terms, the rule which in modern times is so clearly stated in that very well known case of *Bent v. Baker* (*k*), and which distinguishes interest in the event from interest in the question. That case had ever since been held to be the governing rule upon the subject, until objections, on the grounds of interest in the event and interest in the question, were all abolished by the salutary and remedial act of Lord *Denman*. One can hardly conceive a more direct interest, as far as bias upon a man's mind goes, than that was which existed in the case of *Bent v. Baker*. It was thus: the witness was called to prove circumstances tending to show that the underwriters to a policy, which he had pro-

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cured to be signed, were not liable to pay the loss upon it. He had himself, after getting the policy underwritten by others, subscribed his own name to it for a sum of 200*l.*, and on that subscription an action had been brought against him. He expressly stated that he expected to contribute to the expense of resisting the claim, and that he had, together with the other underwriters on the same policy, filed a bill of discovery against the assured. Yet he was held to be a good witness. Every one knows that where there is no consolidation rule, when there is a question between one underwriter and the assured, or between one party upon a policy and the assured, the evidence of another underwriter, or another party to the policy is admissible, upon the principle that, in such a case, there is only a bias arising from an interest in the question, and not in the event. If there had been a consolidation rule, it would have been different, for the proposed witness would have been, under that rule, a party in the cause, and the objection would then have assumed a very different and much stronger shape.

The *Scotch* law lays down the rule in words which are rather remarkable ; it uses the expression, that it is not enough that the parties "*fovent consimilem causam*" (that is the expression of the old lawyers), but they must have an interest in the event itself, and so far, therefore, the principle of the *Scotch* law is precisely the same with the doctrine in the case of *Bent v. Baker*. I am, therefore, of opinion that, viewing this case both upon principle and upon precedent, there is no difficulty in it. I differ from their Lordships in the Court below, who think that there would have been a difficulty but for the case of *Watson v. Watson*, which, in my mind, occasions none at all. If any case was cited such as *Watson's* is supposed to have been, on the one side, there is the case of *Ralston v. Rowatt*, which is a very strong and decisive case, on the other. By that we must be guided.

Lord *Campbell*.—I am of the same opinion. I think that this person was a competent witness for the appellants upon the trial of this issue. With respect to the question of incompetency on the ground of interest, I apprehend that the law of *England* and the law of *Scotland* are exactly the same as the law of *England* was before Lord *Denman's* Act. It appears from the authorities in the institutional writers, to which my noble and learned friend has referred, that they very distinctly anticipate the rule laid down in *Bent v. Baker*, they show that interest in the question is not enough to disqualify, but that there must be an interest in the event of the suit.

When a witness is objected to on the score of interest, it must be on one of two grounds, either that the verdict, in accordance with the evidence which he gives, may afterwards be produced in evidence for the witness, or that the witness will, from the result of the suit, directly obtain a benefit, if the verdict shall be according to his evidence. Both of those grounds of objection have been made in this case, but it seems to me that neither of them is supported.

With regard to the objection that the verdict which may be pronounced for the appellants might be given in evidence in favour of the witness, I take it to be quite clear that that is untenable. Independently of any legal objection to the reception of such evidence, nay, even assuming that the verdict on the issue given on the testimony of this witness might be evidence in another case, the single circumstance of it being shown to have been obtained upon her evidence, would be enough to prevent any weight being given to it; that, however, is not the ground upon which I rely. For it is quite clear to me that that verdict could not be given in evidence by *Elizabeth Wood*. In the first place, the verdict, *per se*, clearly could not be given in evidence, because the verdict would be merely upon the issue, “whether

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the pursuers were cousins, and nearest lawful heirs portioners of *Alexander Wood*, the deceased," which, it is quite clear, could not be evidence to prove the title of the witness.

Then what could be given in evidence? The judgment! No. Supposing that the service is set aside upon the verdict pronounced upon the issue, what would be the consequence? The consequence would be that the service of the retour would be annulled, would be cased, would be annihilated, and would be as if it had never had an existence. There would be no occasion to resort to the circuitous process of allowing the retour to be given in evidence, and then to give the judgment in evidence, whereby it had been cased and destroyed. I take it that no professional man would venture to give the service in evidence with a knowledge of the fact, that it had been set aside by the solemn judgment of a Court. In no point of view then can the objection be maintained that the verdict, or the judgment upon the verdict, might be given in evidence in favour of the witness, if she should afterwards bring an action or institute some proceeding for the purpose of recovering a share of the personalty of *Alexander Wood*.

The question then is reduced to this—whether *Elizabeth Wood* has any direct interest in the result of this suit; and it is stated in this way, that the result of this suit will be, that the service and the retour, which are a bar in her way, if she should set up her claim to a share in the personalty, would be destroyed by the evidence which she gives. But let me suppose the necessary consequence of this verdict upon that issue to be that the service shall be set aside (I am not clear that that follows, but I suppose it to follow), what will be the consequence? It is merely that she, by her evidence, will get rid of a piece of evi-

dence which would stand in her way if she should seek to recover a share of the personalty. That is the strongest manner in which it can be put, that she is to get rid of a piece of evidence against her which would not be at all an insuperable objection to her claim, but which would simply stand in her way, and might be given in evidence if she should institute a process for the purpose of recovering a share of the personalty. It would be very strange if that could disqualify the witness; because, supposing that the service is evidence upon a proceeding brought by her in respect of the personalty (which the Judges below have not said), but supposing it was evidence, it would not weigh a feather, because these services, though they are receivable, are utterly immaterial; but, supposing that it could be treated as substantial evidence, it is only a piece of evidence, and is not conclusive proof. Although the service should be set up, she may yet be able to make out her claim to the personalty, and, on the other hand, though the service should be set aside, she still may not succeed; therefore, the service, standing or being set aside, does not necessarily lead either one way or the other to her recovering or not a share of the personalty. She merely gets rid of a piece of evidence which perhaps might otherwise, in addition to other more important evidence, turn the scale against her. That is the whole.

There is no case in *England* in which a Court has held that such an interest will disqualify a witness. The interest in the result of the suit must be an interest in the nature of something substantial—something in the shape of lands, or goods, or money—which shall come to the witness, or shall be lost by the witness, as the direct and necessary result of the suit upon the trial of which the person is called as a witness.

I think that the objection is untenable on either ground,

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and that the judgment of the Court below ought therefore to be reversed. With regard to the case of *Watson v. Watson*, I do not think it at all necessary to consider whether it differs or not from the present case, because even if it was on all fours with it, there are other cases laying down the opposite rule, which are equally in point, one of which, that of *Ralston v. Rowatt*, was decided by this House.

I am therefore of opinion that the decision of the Court below must be reversed.

The interlocutor was then reversed, and a new trial directed.

<p>THE TAFF VALE RAILWAY COMPANY WILLIAM NIXON and others</p>	<p>-</p>	<p><i>Appellants.</i> <i>Respondents.</i></p>	<p>1847. May 3, 6.</p>
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N. and S. contracted with a railway company, jointly and severally, to execute railway works, according to specifications and prices contained in a former contract between N. and the company. S. was to advance the money necessary for the execution of the works, and to receive from the company all monies accruing due from them in respect of the works, and apply them in discharge of N.'s liabilities under his contracts. S. became a bankrupt at the completion of the works, and the company, after paying him and his assignees part of the monies due from them, refused to account with N. for the balance, whereupon he filed a bill for an account against them and S.'s assignees :—

*Railway Con-
tracts and
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Complicated
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Held, that although the case against the company consisted of matters cognizable at law, yet as there were complicated accounts between them and the other parties respectively, a court of equity was more competent to take them, and to dispose of the whole case, than a court of law, and the bill was sustained accordingly.

THIS was an appeal from a decree of the Vice Chancellor of *England*, directing certain accounts to be taken, as hereinafter mentioned ; and the question in substance was, whether an action at law was not a more appropriate course of proceeding than a bill in equity.

The appellants were a railway company, incorporated by act of Parliament. The respondent *Nixon* was a railway contractor, and by an indenture dated the 6th of *April*, 1838, and made between him and the appellants, being a railway contract in the ordinary form, he contracted to do certain works mentioned in the specification annexed thereto, for the sum of 7395*l.* 15*s.*, subject to deduction or increase as in the contract

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stated, and with a provision for payment for extra works, at prices particularly specified. *Nixon* having to some extent proceeded with the execution of the works, was under the necessity of procuring advances of money, and for that purpose applied to *David Storm*, who was also a railway contractor, to advance him sufficient money to complete the works, which *Storm* agreed to do, and accordingly an agreement was entered into (a), and a power of attorney, dated 8th *December*, 1838, was given by *Nixon*, which, after reciting the said contract and application to *Storm* for the advance of money, constituted him the lawful attorney of *Nixon*, to direct and carry on, in his name, the works comprised in the contract, and to demand, sue for, and receive from the company all sums of money which from time to time might become due from them to *Nixon* under the contract, and to give them discharges, and to compromise or refer to arbitration all disputes that might arise respecting the performance of the works, and also to pay for *Nixon*, out of the monies to be received from the company, all debts and just demands which might accrue to *Storm* or others, against *Nixon* during the progress, and until the completion, of the said works, and generally to do and perform all acts which *Storm* should judge necessary in and about the premises, and to retain to himself, out of the monies to be received from the company, 5*l.* per cent. for interest on all his advances and 300*l.* at the completion of the contract, for his care and attention in directing and carrying on the works.

Notice of the agreement and power of attorney was sent to the appellants, together with a letter from *Nixon*, re-

(a) The agreement was a separate memorandum, explanatory and restrictive of the power of attorney, viz., that the same should not be acted on as regarded the managing and conducting of the works by *Storm* without *Nixon's* consent.

questing them to pay to *Storm* all monies becoming due to *Nixon* on account of the contract.

In *March* 1839, an arrangement was come to by *Nixon* and *Storm* and the appellants, by which a new contract between the appellants and them, as joint contractors, was substituted for the first contract with *Nixon*, and he and *Storm*, by the new contract, jointly and severally covenanted for the performance of the contract; and the appellants covenanted to pay them as well for the works then done and not paid for, as also for the works to be done by them jointly.

The works were proceeded with under this contract, *Nixon* having the management of the working part, but the appellants transacting all money matters connected with the contract with *Storm*.

In *December* 1840 a fiat in bankruptcy was issued against *Storm*, under which he was declared a bankrupt, and one *Nicholas* and two others were appointed creditors' assignees. There was also an official assignee.

In *May* 1842 *Nixon* filed his bill against the appellants and the said assignees, and thereby, after stating the instruments before stated, he made the following case, viz.:—That notwithstanding the last mentioned contract, the works were carried on by *Nixon* in the same manner as before; and he continued to carry on and execute the same from that time until both the specified works and the extra works were completed; that in *January* 1841 all the works were completed pursuant to the contract, and the extra works so performed amounted to the sum of 9133*l.* 2*s.* 1*d.*, according to the schedule of prices annexed to the contract, and the specified works amounted to the sum of 7395*l.* 15*s.*, making together the sum of 16,528*l.* 17*s.* 1*d.*; that during the progress of the works, and at the completion thereof, and before the 16th of *December*, 1840, *Nixon* and *Storm* had received various

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sums of money on account of the contract and extra works, amounting in the whole to 920*4*l. 12*s.* 6*d.*, and no more, so that there remained a balance of 732*4*l. 4*s.* 7*d.* due from the company to *Nixon*; that in the month of *December* 1840 *Nixon* had reason to believe that *Storm* was in embarrassed circumstances, and he requested his solicitor to give notice to the company not to pay *Storm* any more money in respect of the contract, and the solicitor wrote and sent a letter to the then secretary of the company, stating that *Nixon* had consulted him upon the situation of his affairs with *Storm* and the company, and his inability to obtain from the company an account of the monies paid by them upon the contract since the 11th of *April* last; that the consideration for the power of attorney from *Nixon* to *Storm* was *Storm's* engagement to advance *Nixon* all sums of money he might require, and inasmuch as *Storm* had not fulfilled his part of the engagement, *Nixon* requested that the company would not pay him any further sums on account of the contract, and also that they would furnish forthwith an account of the monies paid by them in respect of the contract since the 11th of *April*, 1840.

The bill next set forth a letter sent to *Nixon* by the solicitors of *Storm's* assignees, dated in *May* 1841, applying for authority to use his name as plaintiff in an action to be brought against the company, to recover balances due to *Storm's* estate in respect of works, money, and materials provided by him in execution of the contract and extra work thereon, up to the time of his bankruptcy; that *Nixon* declined to comply with that request; that after the works were completed, he sent to the company the particulars of his demand on them, and requested payment of the balance of 732*4*l. 4*s.* 7*d.*, and the company then, and ever since admitted, that the whole of the work amounted to the sum of 16,528*l.* 17*s.* 1*d.*; and that *Nixon* alone, or he and *Storm*, were entitled to receive that sum, but they alleged that a much larger sum than 920*4*l. 12*s.* 6*d.*

had been paid by them to *Nixon*, and to *Storm* and his assignees, and a very small sum only remained due, or that the said balance, or the greater part thereof, had been in some manner settled or accounted for with *Storm* or his assignees, whereas he, *Nixon*, charged the contrary; and that if any further or other sum than 9204*l.* 12*s.* 6*d.*, before mentioned, was paid by the company to *Storm*, the same was paid since the company received the notice of *December* 1840, or in respect of some other work done for the company, with which *Nixon* had nothing to do, and which was not connected with the said contract.

The bill further stated, that, in *April* 1842, *Nixon's* solicitor sent a letter to the company's secretary, demanding payment of the said balance, 7324*l.* 4*s.* 7*d.*, and intimating, that unless some immediate arrangement was made for its payment, they would institute proceedings for its recovery; that the secretary to the company sent an answer by letter, which, after stating the effects of the first and substituted contracts, the power of attorney to *Storm*, and his bankruptcy, &c., concluded by saying the settlement of the accounts was to be submitted to the arbitration of Mr. *Robert Stephenson*, and if *Nixon* had any claim on the company in common with *Storm*, the whole affair would be settled by the arbitrator; that after receipt of this letter, *Nixon's* solicitors inquired and discovered that the company and the assignees of *Storm* had agreed to refer all the matters of the said contracts, and many questions of account between the company and *Nixon* and the assignees, and other questions between the assignees and the company, to Mr. *Stephenson*, who was in fact proceeding to arbitrate thereupon, without the authority or consent of *Nixon*, and that it was the intention of the company to pay to the assignees whatever balance the arbitrator should find due; that all the money that was due from *Nixon* to *Storm*, in respect of his advances, had been paid to him or his assignees.

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7. The bill prayed that accounts might be taken of all sums paid by the appellants to *Nixon* and to *Storm* and his assignees, in discharge of the said sums of 7395*l.* 15*s.*, and 9133*l.* 2*s.* 1*d.*; and of all monies advanced and properly laid out by *Storm*, on account of the works; and that the sums so received by him and his assignees might be set off against the sums so laid out by him, and the balance ascertained, &c.; and that the company might be restrained from paying any sums to the said assignees; and that they, the assignees, might be restrained from instituting any action or other proceeding against *Nixon*, in respect of the matters aforesaid.

The appellants, by their answer, submitted that the suit was improperly framed, that they had no connection or privity with the dealings and accounts between *Nixon* and *Storm*, and ought not to be parties to any suit in respect thereof; that *Nixon* was not entitled to any account or relief against the appellants in respect of the said contract and extra works, and the mixing up of such account with the pecuniary transactions between *Nixon* and *Storm* was multifarious, and they claimed the same benefit of such objection as if they had demurred to the bill; and they further said, that they and the assignees had agreed to refer all the matters of the contract to Mr. *Stephenson*, and he had made his award thereon.

The other defendants to the bill having also put in their answers, the cause came to be heard before the Vice Chancellor of *England*, who, in giving his judgment, observed that "he did not see in the case anything to distinguish it from the ordinary case of a person making a mortgage of his debt; and, that being so, it followed as a matter of right that *Nixon* ought to be a party to the settlement of that sort of double account, which would, first of all, have to ascertain what was due from him to his mortgagee, and then what was due from his debtors to him, in order that it might be seen what was the true state of the accounts

between the parties." His Honour, accordingly, pronounced a decree, referring it to the Master to take the following accounts, viz.:—

An account of all extra works performed by *Nixon* for the *Taff Vale* Railway Company, under the said contract. An account of all sums of money paid by them to *Nixon* and to *Storm*, or either of them, on account of such extra works. Whether anything, and what, then remained due from the appellants in respect of the said extra works, having regard to the said payments. An account of all sums of money paid and advanced by *Storm*, to or on account of *Nixon*, to carry on the said works, as well extra as specified. An account of the corn, hay, and all other materials supplied by *Storm*, to or on account of *Nixon*, in carrying on such works. An account of all sums of money paid by the company to *Storm* on account of the contract: And whether any, and what, sum of money then remained due from *Nixon* to the defendants, the assignees, in respect of such advances and supplies of hay, corn, and other materials made by *Storm* on account of *Nixon*, and in respect of interest on such advances and monies chargeable for such supplies.

The appeal was against that decree.

Sir *F. Kelly* and Mr. *Stuart* (with whom was Mr. *W. M. James*) for the appellants:—

All the matters in dispute in this cause might have been easily disposed of at law if *Nixon* had allowed his name to be used in the action proposed by the assignees of *Storm* to be brought against the appellants:—

[The *Lord Chancellor*.—It may be a question whether matters so complicated as these accounts appear to be, were not fitter for a suit in equity than for an action.]

The only case made by the bill against the appellants was that of legal liability to pay a legal debt under a contract for railway works in the ordinary form; and no case of account or other ground for equitable relief is stated by

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the bill. If the contract was not under seal, the simplest form of action, an action for work and labour done, would settle the dispute as against the appellants. Then why should they be dragged into a suit in equity? As between them and *Nixon*, and *Storm*, these latter were joint contractors, having a joint interest in the contract, and it is wholly without precedent, and against the established principles of courts of equity, that, where there is a contract between an individual (or company) and a partnership, the mere occurrence of disputes between the partners, requiring the interposition of a court of equity as to partnership concerns, the individual who has entered into a contract with them, or any other debtors of the partnership, should be liable to be made defendants to a suit in equity for settling the partnership disputes. But even if there were some accounts to be settled with the appellants, it is not quite clear that a Master in Chancery would settle them better than a judge and jury. The only question raised against the company on the bill, was whether 9204*l.* claimed by *Nixon* was due from them. That was a question for a court of law or for an arbitrator; and on the refusal of *Nixon* to lend his name for an action, an arbitrator, a most competent one for this purpose, was appointed, with the consent of all the parties except *Nixon*. A view of the works, necessary for the proper settlement of the accounts, was taken by the arbitrator, which a Master in Chancery would not do. The Master's Office is not a proper place for taking accounts of works under a contract, and of payments thereunder; and if any relief at all ought to have been given against the appellants, it should have been by giving such directions as would have enabled the question and amount of their legal liability to be tried in an action at law.

The complaint and case made by *Nixon* was twofold; first as between him and the company, secondly as between him and *Storm* and his assignees. This second case might be a fit subject for a suit in equity, but there

was no reason for dragging the company into that suit. Even if the Vice Chancellor was right in considering the case as to the appellants as the case of a mortgage of a debt due from them, it is without precedent, and would be of most dangerous results, to hold that a creditor, by his own act in mortgaging his debts, might transfer the jurisdiction as to all his debts to a suit in equity, and to an account in the Master's Office. The appellants ought not, in any view of the case, to have been made parties to a suit for taking the accounts between *Nixon* and the assignees of *Storm*. Such a suit is irregular and multifarious.

The state of the case was this :—*Nixon* and *Storm* contracted to do certain works for the company at specified prices, amounting to 16000*l.* odd; they admitted that the company paid 9000*l.* odd, and the bill was filed for the alleged balance. Was not that a proper case for an action to recover the balance? If a suit in Chancery be held to be a more appropriate course of proceeding in this case, then every builder's bill of charges may be fit for a suit in equity :—

[The *Lord Chancellor*.—And properly so, if there be complicated accounts. It is here admitted that there are accounts between *Nixon* and *Storm* proper for a suit in equity, and that the money to answer these accounts, when taken, are in the hands of the railway company. Are they not in the position of stakeholders.]

The bill does not state a case of that nature—it does pray an injunction against the company's paying *Storm*; but they are not about to pay him, or his assignees, and no injunction was necessary, nor was it applied for. The reference to Mr. *Stephenson* was not impugned by the bill, which only seeks to restrain payment of what should be found due by his award: and the decree, while directing accounts generally as against the appellants of all the works and payments, omits to make any declaration as to the reference and the award made under it.

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It is of great importance to preserve the distinction between cases which are proper for a suit in equity, and those which may be disposed of by an action at law. That distinction was properly taken by Lord Chancellor King, in the case of *Dhegetoft v. The London Assurance Company* (b), which was affirmed in this House (c), and in *Fall v. Chambers* (d). In both cases his lordship allowed demurrers to the bills, saying in the latter case, "If I should give way in this attempt, no action would ever be brought upon a policy, and a bill might as well be brought for payment of a bond, on suggestion that the witnesses were abroad, &c. The jury will take the account, and consider of salvage, and all proper allowances, and do it in all such trials." It is not the practice of a court of equity to draw matters under its jurisdiction; and the question for the House to determine is, whether this case, though somewhat complicated as between *Nixon* and *Storm*, is not, as to the appellants, a case of simple facts, in which they were to make payments for certain works done for them according to contract. The demand against them is not to be split and apportioned between the joint contractors. It is desirable that some intelligible rule should be laid down by the highest tribunal for withdrawing cases like this from courts of equity. It is impossible for the respondents to put their case higher than that it is one of concurrent jurisdiction; but the appellants do not grant that. In a case in the Exchequer, *King v. Rossett* (e), it was held that the further ingredient of the relation of principal and agent was not sufficient to entitle the plaintiff there to relief in equity if the account could be fairly taken at law, and a demurrer was allowed on that ground.

[The Lord Chancellor.—You did not demur.]

No; but the objection was raised in our answer, and we craved the benefit of it as if we had demurred. Our an-

(b) Moseley, 83.

(d) Moseley, 193.

(c) *Nom. Marino de Ghettoff*,

(e) 2 You. & Jerv. 33.

4 Bro. P. C. 436.

swer, having brought the award before the court, took the objection properly. How is that award to stand with *Nixon's* case? He should have first got rid of the award, which, if his bill be sustained, must be treated as a nullity.

[Mr. *Bethell*, of counsel for the respondents, said the award was not made when the bill was filed.]

It was made before answer put in, and no application was made to the court to stay the award by injunction or otherwise.

Mr. *Bethell*, Mr. *Stinton*, Mr. *Peacock*, and Mr. *Whitbread*, appeared for the various respondents, but were not called on.

The *Lord Chancellor*.—My Lords, having fully considered the arguments urged on behalf of the appellants in this case, it appears to me to be unnecessary to hear the counsel on the other side, and that, according to all the authorities, the decree is fully justified by the facts as they appeared before the Vice Chancellor.

There were some cases cited in order to show that there are instances in which a court of equity refuses to exercise any jurisdiction upon any matter of law. I have no doubt that is so; but the question is whether this is one of those cases.

Now I think the rule is very well laid down by Lord *Redesdale* in the case of *O'Connor v. Spaight* in which he says (*e*), “The ground on which I think that this is a proper case for equity, is, that the account has become so complicated that a court of law would be incompetent to examine it, upon a trial at *Nisi Prius*, with all necessary accuracy, and it could appear only from the result of the account that the rent was not due. This is a principle on which courts of equity constantly act, by taking cognizance of matters, which, though cognizable at law, are yet so involved with a complex account, that it cannot pro-

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perly be taken at law, and until the result of the account, the justice of the case cannot appear. Matter of account may indeed be made the subject of an action; but an account of this sort is not a proper subject for this mode of proceeding. The old mode of proceeding upon the writ of account shows it. The only judgment was that the party 'should account,' and then the account was taken by the auditor. The court never went into it."

That, my lords, is the rule applicable to questions of this sort; and it is quite obvious from the rule so laid down, that each case must be decided according to the peculiar circumstances belonging to it. It is, therefore, nothing to the purpose to show that there are cases where the court will not entertain jurisdiction, because it is a matter of law. Each case must be investigated, in order to see whether it comes within the rule laid down as that upon which a court of equity exercises its jurisdiction.

A very short reference to the facts of this case will show, beyond all controversy, that this is one of those cases. Here a contract was originally made by *William Nixon* with the railway company. A specification of the works to be done was appended to the contract. That certainly is complicated enough, as indeed all specifications of contracts are. It appears that he wanted money to carry into effect the contract which he had entered into, and he then applied to the other party, *Storm*, to assist him with money, and he assigned to him, as security for repayment of the money so advanced, the payments which he might have to receive under his contract.

This went on for some time, and afterwards a new scheme was adopted for the purpose of giving to the party who so advanced the money the security of the payments which might become due from the company in respect of the original contract with *Nixon*. To this contract all three were parties. It was made in the shape of a joint contract, by which both the liabilities and the rights

company on the one hand and these two parties on the other, by which they became joint contractors for the works which were to be performed under the contract originally entered into by *Nixon* with the railway com-

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Although that is in the form of a joint contract, and it gives to each party a right, independently of the other, to deal with the railway company, yet it is admitted, on both hands, that it was adopted for the purpose of adding the security which *Nixon* was to give for the money due under the contract. But it appears that the other party was not only himself a party to the joint contract with *Nixon*, but that he himself executed work independently of *Nixon*. By this means there was an agreement between him and *Nixon*, and the company, on the one hand, and the railway company, on the other, in respect of the contract in which *Nixon* was a joint contractor; and there was also an account of payments that were due in respect of the contract which he had formerly entered into. The company, however, as they appear in their answer, dealt with these as payments on account generally, and they say that they are unable to determine whether those payments are to be referred to the one or to the other; the payments were made by the company as the monies became due, without reference to the particular works in respect of which they were made. Hence, not only is the account of this complicated nature

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the mode in which the appellants, the company themselves, have dealt with the several contracts, not keeping distinct those payments in which *Nixon* was interested, but making them as payments on account generally, some of which might be referred to one account and some to another, but which they have not distinguished.

Under these circumstances *Nixon* files his bill, and asks for an account to be taken of what is due from this company in respect of the contract in which he was originally interested; and also for an account to be taken as between himself and the other party who had become interested in the account as security for the money advanced.

Looking at the rule laid down by Lord *Redesdale*, and looking at the facts of this case as they are developed in these papers, it appears to me clear that if ever there was a case which was quite unfit for a trial at law, and which necessarily became the subject of investigation in a court of equity, the facts of this case come within that rule; and that is the point for our consideration here. The appellants say, "You have no right to direct this account to be taken in equity; it is entirely a matter of law; let us go to law to try the question between us." I think that the Vice Chancellor was entirely right in the course that he took, and that the case ought to be investigated at equity.

I have therefore to move your lordships that the decree appealed from be affirmed.

Lord *Brougham*.—I have no desire to take any part in this deliberation, for this reason, that I did not hear the whole of the arguments for the appellants; but what I did hear, and my examination of the printed cases, have led me to the conclusion at which my noble and learned friend has arrived, that this is clearly a case for a court of equity, and one that is not fit to be sent to trial at law.

At the same time, as I did not take any active part during the argument, I shall decline entering further upon the case except to say that I entirely concur, as far as I have heard the case, in the observations which my noble and learned friend has made.

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Lord *Campbell*.—My lords, having heard the whole of the argument for the appellants in this case, and having considered it very carefully, I have come to a clear conclusion that this decree ought to be affirmed. I have great satisfaction in doing so, because if there really had been any technical rule whereby a bill in equity could not have been filed in this case, it would have amounted to a very great defect. For if an action at law were the only remedy in such a case, it really would amount, in my opinion, to a denial of justice.

I do not proceed merely upon the ground, which is stated in the case as having been taken by his Honour the Vice Chancellor; I proceed upon this ground, that here is a complicated account that could not by possibility be taken by a jury. The facts of the case, as stated by my noble and learned friend on the Woolsack, very clearly show that it would be a mere mockery to bring such an action before a jury. What would be done if such an action were brought at *Nisi Prius*? I know that within five minutes from the opening of the case by the leading counsel for the plaintiffs, the judge would say, "If we sit here for a fortnight we cannot try this sort of case, and therefore it is indispensably necessary for the sake of justice—not to save us from the trouble of trying the case, which we are perfectly willing to take—but for the sake of justice, that there should be a reference to an arbitrator who will take accounts between the parties."

My Lords, in ninety-nine cases out of a hundred, that recommendation would at once be acceded to. Sometimes there is a wrong-headed client, who is fool enough

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to resist such a recommendation, and to whom, according to a well-known saying that we have in Westminster Hall, it is necessary to use "strong language" to induce him to listen to the recommendation of my Lord the judge.

But, my Lords, it is quite clear that trial by jury never was meant for such a case, and it is wholly incapable of doing justice in such a case. Although a demand may resolve itself into a legal demand, still if there is such a complication of accounts that it is not a fit case for a trial at law, then according to the rule laid down by that most eminent judge, Lord *Redesdale*, a bill in equity is the remedy. That, if properly pursued, will be effectual, because that is followed by a reference to the Master, and the Master takes the account, and he does justice between the parties; he at once doing properly what, after great expense incurred by an action at law in bringing the case before a jury, would at last have to be attempted by arbitration.

My Lords, I may be allowed at this point to say that I think some important improvement might be made even with reference to this remedy of a bill in equity in a case of this sort; because I think it is an enormous hardship upon parties coming into the Master's Office, taking out warrant after warrant for months and years, and sitting an hour a day in a very complicated account. But if there were to be means taken, which I hope we may see taken in cases of this sort, first of accelerating the proceedings for bringing it into the Master's Office, and then, when it is in the Master's Office, going on continuously until the account is taken, speedy and ample justice would be done. This decision to which your Lordships are prepared to come, certainly will tend to facilitate these further improvements; and I only hope that after it is fully established that a bill in equity will lie in cases of this sort; the practice of bringing an action at law and incurring enormous expense, and then referring the matter to arbitra-

tion, will fall into disuse, and that at once, in a case of this sort, the remedy which is afforded by a bill in equity will be resorted to, and that then by some improvement in the mode of taking the account in the Master's Office, speedy and effectual justice may be done.

Under the circumstances of this case, it is quite clear that the account is of a very complicated nature, which could not by possibility be taken before a jury; and therefore I am very glad to find that according to the authorities and the established doctrine of a court of equity, a bill in equity may be brought in such a case, and on this ground I entirely concur in the motion of my noble and learned friend, that the decree of the Vice Chancellor be affirmed.

Lord Brougham.—My Lords, I rise only to mention a circumstance which my noble and learned friend reminds me of, that it was formerly so much a matter of course, when cases of this sort came before us at *Nisi Prius* upon the Northern Circuit, to refer them to arbitration, that we invented a phrase for it at consultation, the meaning of which was, that it could not be tried, and that the leading counsel for the plaintiff would, what is commonly called, “open a reference.” Now, the course ought to be a bill in equity; that is clearly the best remedy: and with my noble and learned friend I entirely concur, in the hope that we may live to see such an improvement in the practice as would eradicate all the abuse and stop all complaints against the Master's Office, and almost against the Court of Chancery—that of parties being obliged to go on, not *de die in diem* merely, but *de hora in horam*, as they do at *Nisi Prius* after due notice.

Lord Campbell.—I may remind your Lordships that the inadequacy of a jury to try such a case was felt so

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strongly by the Common Law Commissioners appointed some years ago, that, to meet the case of an obstinate party who stood out against the recommendation of a reference, they recommended that an act of Parliament should be passed giving the judge power to force a reference ; and such a bill was brought in, but it was opposed by high authority. There was, however, a great improvement made in the most preposterous rule of the common law as to revoking the appointment of an arbitrator. That improvement was introduced, but it was thought that it would be improper to give the power of compulsory reference. The bill therefore, after a good deal of deliberation in both Houses of Parliament, was dropped. I only mention that, in order to show the opinion that was then entertained of the extreme impossibility of a jury trying a case of this description. But if it could be taken speedily to the Master's Office, and the Master were then to sit continuously to dispose of it, I am sure that it would be a very great improvement in the administration of justice in such cases.

The decree was then affirmed, with costs.

MARY WORDSWORTH and GEORGE WORDS-	}	<i>Appellants.</i>	1847. May 17, 18, and 20.
WORTH, infants, by WILLIAM GILLETT, their next friend - - -			
FREDERICK WOOD and others -		<i>Respondents.</i>	

A testator, after various bequests, gave to his wife, for her life only, all his remaining estates, and also gave her all his capital in trade, with the three quarters of the profits arising therefrom, for her life; but nevertheless, in trust, at her death, for his then surviving children, share and share alike, "independent of the rental of his said estates, which he gave and bequeathed to his surviving female children," to be paid to them as he directed. The testator then proceeded thus: "On the decease of any of these children, should they die without issue lawfully begotten, that share to fall to the rest, and so on to the last female child; but should they marry and have children, then their share to go to the said child or children, and from my last female child to the males of my body lawfully begotten, with the same restrictions as before expressed, and to the heirs and assigns of the last of them." One of the testator's daughters, after his death, married, and died in the lifetime of his widow, leaving children:—
Held, that such children did not take any interest under the will, the word "surviving" having reference to the death of the testator's widow, and not to his own.

Will: Construction of the word "surviving;" to what period referable.

THE question in this appeal arose on a clause in the will of Mr. *Joseph Wood*, the maternal grandfather of the appellants, by which—after directing payment of his debt and funeral expenses, and an abstract to be made of all his property, estates, freehold, leasehold, ground rents, &c., as the property he had to bequeath—he gave and bequeathed to his son, *Joseph Carter Wood*, one quarter part of the profits of his brewery in *Westminster*, and the

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house adjoining the brewery, rent and tax free, so long as he should reside on the premises in the said house, to conduct the business; the brewery, store-houses, and other premises, to pay to his general estate 400*l.* per annum rent for the same, net, and clear of all taxes; and he nominated and appointed his wife, *Mary Wood*, and his said son, his sole executors.

After other directions for renewing leaseholds held by the testator under the Dean and Chapter of *Westminster*, “so that the estates may be always kept renewed, that the younger children may have an equal benefit of time, and so to continue to be provided for, for ever;” and after gifts of freehold cottages to each of his sons, to give them votes for the county of *Middlesex*, the will proceeded as follows:—

“And now I do give and bequeath to my dear wife, *Mary Wood*, in trust for her life only, all my remaining estates, freeholds, leaseholds, ground rents, and reversions, rent charges, plate, linen, and the household furniture in the houses at *Westminster*, and *Park House*, parish of *Hayes*, county of *Middlesex*, with the pictures, and any particular articles she may be desirous of from my estates in *Devonshire*: As also, I leave, give, and bequeath to my said dear wife, all my capital in trade, with the three quarters of the profits arising therefrom, for her life; but nevertheless, in trust, at her death, for my then surviving children, share and share alike, independent of the rental of my said estates, which I give and bequeath to my surviving female children, to be paid them as follows, by my executor, *J. C. Wood*, or his heirs and assigns: that is to say, the whole rents and produce, share and share alike, of all such freeholds, leaseholds, ground rents and reversions, rent charges, plate, and household furniture, as before mentioned, but to have no power to sell, mortgage, or in any way whatsoever encumber the same; on the contrary, the rents of which I direct may be received by

my executor, *J. C. Wood*, and paid by him to them one month after each quarter day, that is, on the 25th of *January*, &c. On the decease of any of these children, should they die without issue lawfully begotten, that share to fall to the rest, and so on to the last female child; but *should they marry and have children, then their share to go to the said child or children*, and from the last female child to the males of my body lawfully begotten, with the same restrictions as before expressed, and to the heirs and assigns of the last of them. But, be it remembered, that my dear daughter, *Mrs. Eliza Johnstone*, is exempt from any benefit arising from this my will, the said *Mrs. Johnstone* having had her share of my property at her marriage, namely, an annuity of 200*l.* per annum, which I do hereby likewise provide for, to be paid quarterly, from my share of three-quarters of the profits of the *Westminster* brewery; but I should recommend my executors to make a sinking fund immediately after my death, to raise a sum of 4000*l.*, which, when raised, I desire may be paid to Captain *Hope Johnstone*, and so redeem the annuity, that the estate may be free to fulfil my desires and requests, in this my last will and testament contained."

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A memorandum, signed by the testator, at the foot of the will, contained the following:—"If my executors should think proper to buy up *Eliza Johnstone's* annuity, the 4000*l.* so paid must be secured by trustees to the said *Eliza Johnstone*, for her whole and sole use and benefit, independent of her husband, and at her death to her children."

The will was dated the 23d of *October*, 1827 (a); the

(a) The will being found not to have been attested so as to pass real estates, Mr. *J. C. Wood*, the testator's eldest son, in whom they consequently became vested, executed, in conjunction with others of the children and their mother, certain indentures, dated in 1831 and 1832, in such manner as to effectuate the testator's intentions.

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testator died soon afterwards, leaving *Mary Wood*, his widow, *Joseph Carter Wood*, his eldest son and heir at law, and four younger sons and seven daughters.

The testator, at the date of his will and at his death, was owner of a brewery in *Westminster*, and seized of a freehold farm and lands in *Devonshire*, a dwelling house and some land at *Hayes, Middlesex*, both in his own occupation, and divers tenements and ground rents in *Westminster* and at *Bermondsey*: also, possessed of divers leasehold public houses, and other tenements and ground rents in and about *Westminster*, some holden on lease for years, absolute or determinable on lives, from the Dean and Chapter of *Westminster*. Of the properties in and near *Westminster*, part was held in connection with his trade of a brewer, and was treated by him as part of the capital employed in the trade; other part was not so connected, but held by himself or by undertenants, and forming part of his estate, independent of his trade.

Georgiana, one of the testator's daughters, married *Mr. Charles F. F. Wordsworth*, in 1834, having previously attained the age of twenty-one years; no settlement or agreement for a settlement was made, and she died in *April* 1837, during the lifetime of the testator's widow, leaving her said husband, and the appellants, her only children, surviving her.

In *March* 1839, the appellants, by their next friend, filed their bill in Chancery against the widow and *J. C. Wood*, and the other sons and the daughters of the testator, and other parties, stating (amongst other things) to the effect hereinbefore stated, and praying that the trusts of the will might be performed under the direction of the Court; and that the rights and interests of the appellants might be declared and ascertained, and that the usual accounts might be taken, &c.

To that bill the respondents, three of the testator's

younger sons, demurred for want of equity, and for multifariousness.

The Master of the Rolls, before whom the demurrer came to be argued, allowed it for want of equity, the counsel for the respondents having abandoned the demurrer for multifariousness (*b*).

The Lord Chancellor, upon appeal, affirmed the order of the Master of the Rolls, but gave no costs (*c*).

This appeal was against both orders.

Mr. *Hodgson* for the appellants :—

This appeal is entitled to indulgence, although brought against two consecutive judgments of the Master of the Rolls and the Lord Chancellor. It arose on the construction of a will more than ordinarily obscure, being drawn unfortunately in language peculiar to the testator, of whose intention, however, to make provisions for all his daughters, transmissible to their children, there can be no doubt—as was observed by the Master of the Rolls. The appeal was advised by Sir *W. Follett*, of whose assistance the appellants are unhappily deprived.

It appears by the will that part of the testator's large property, freehold and leasehold, was held by him in connection with his trade of a brewer, and was treated by him as part of his capital employed in that trade; other parts, held by himself or his tenants, were considered by him as distinct from and independent of his trade; he calls them the rental of his estates—probably to denote that they yielded a rental which he spent—and it is with these that the appeal has to deal. The chief difficulty in the case is to determine the meaning of the words “my surviving female children,” which closely follow the words, “my then surviving children.” These last words clearly mean such of the testator's children as should be living at the death of his widow. The first step in our

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(*b*) 2 Beav. 25.

(*c*) 4 Myl. & C. 641.

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argument is, that the two forms of expression being read separately, and contrasted with each other, the words "surviving female children" cannot have the same meaning as the words "then surviving children," and consequently ought not to be construed "living at the death of the widow." The next step is to show that the words, read in connection with the context of the will, lead to the same conclusion as when read separately.

The testator, in the first place, gives his freehold house in *Bermondsey*, and the *Duke's Head, Westminster*, to his eldest son, and one of his smaller houses at the back of the *Duke's Head*, to each of his younger sons (to give them votes), and the remainder (if any) of this estate (meaning, as it would seem, the estate at the back of the *Duke's Head*) to *J. C. Wood*. He then gives to his wife all his remaining estates, freehold, leasehold, ground rents, &c., for her life; and then he divides his property into two parts—one of which he describes as his "capital in trade, with the three-quarters of the profits arising therefrom," and the other of which he calls "the rental of his estates"—meaning, probably, his estates yielding a rental. The former of these (the trade property) he gives, after his wife's decease, to his "then surviving children." This, he says, is to be "independent of the rental of estates," which he gives to the surviving (omitting the word "then") female children. With reference to the trade property, there might be good reasons existing in the testator's mind for confining that gift to children living at the time of the devolution of the property to them in possession, and for giving them absolute interests in it, in order to secure efficient management; but there was no such reason in regard to his estates unconnected with the trade, and the question therefore is, whether *Mrs. Wordsworth's* taking any share in the property yielding a rental, was to depend on the accident of her surviving her mother.

The testator, in speaking of "the capital of his trade" and "the rental of his estates," does not keep them separate and distinct in all parts of the will, but sometimes mixes them together, so as to make it difficult to determine to what point the line of separation extends: but with all this confusion and obscurity, he appears to have a scheme in his mind including provisions for every member of his family—for all of them in classes. After the gifts of houses to his sons, to make them freeholders, and a quarter of the profits of the brewery to the eldest, he then makes provision for his widow and for all his children, male and female, who should be living at her death. There cannot be a question that the words "*then surviving*," are to be referred to the widow's death. The testator, at that part of his will, recollecting that, besides that general provision for all his children, he had previously given bequests to every one of his sons, seems to ask himself, what am I to do for my daughters? He then gives the rental of his estates to them, but not absolutely, as he had given the brewery property to his sons and daughters, but only for their lives, with a remainder—which, in the arguments in the courts below, was treated as a substitutionary clause—for their children.

Assuming, in the first instance, that it was a remainder, the first question is, whether it is clear and necessary to conclude that the testator has given his widow any interest in this "rental." There is a contradiction upon the face of the will certainly, but it is open to your Lordships, looking at what comes after the words "independent of the rental of my said estates," to say this, the rental of his estates was that part of his property which he had assigned for the surviving female children. If that could be established, then your Lordships would see there is no life estate, to the termination of which the word "*surviving*" can, with any propriety, be applied; and the words "*surviving female children*," must mean those female children

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who were living at the time he made his will, or who should be living at the time of his death. That is a doubtful point, but it is worth consideration.

In giving the brewery property, at the death of his wife, to his "then surviving children," he took care to use words plain enough to express his meaning, but in the gift of the rental of his estates, he did not say "my *then* surviving," but "my surviving female children." When the testator made so marked a difference in his language, it is not unfair to conclude that he had something different in his mind, and that he did not mean the "*then* surviving female children," but some other class of his female children, and he describes them as "surviving."

This word in wills was, for a long period of time, considered to refer to the testator's death, as it does now, sometimes especially, with regard to real estates; and it is to be observed, that this is, to a large extent, real estate. However, the testator has made a marked distinction between the two expressions, first saying, his *then* surviving children, and immediately afterwards, his surviving daughters only,—the words are, "independent of the rental of my said estates, which I give and bequeath to my surviving female children, to be paid them as follows by my executor, or his heirs or assigns." Then he gives directions for quarterly payments to these daughters, some of whom were under age, without saying when the payments should commence; but there is nothing to lead one to the conclusion that he did not mean them to commence upon his own death. He does not positively say "from my decease," but neither does he say "from the decease of my wife," which one would have expected he would have said if he had so intended. The gift to the surviving female children is followed by a provision, that, "on the decease of any of these children," their shares should go to their children, or in default of such children, to the other females, daughters of the testator; and in

default of all of them, to the males, his sons. The context shows plainly that he intended this clause to apply only to that provision of which female children were the first objects—to those objects which were designated by the word “surviving,” and not to those denoted by the words “then surviving.” He gave their shares, if they should marry and have children, to such children, who were to stand in the places of their mothers, and to take their shares; but if they should die without issue, then the shares were to go over from female to female, and, after the exhaustion of the females, to the males.

The obvious meaning of such a clause was to provide for the accident of a daughter dying, leaving children; and the words of the clause are general, importing the death of a daughter at any time—therefore in the widow’s lifetime as well as after her death. But it is to be recollected that daughters are not excluded from the former gift to the *then surviving* children; it may therefore be inferred, that the testator had in his mind the probable event of a daughter dying in his widow’s lifetime, leaving children; if not, why should he not have extended the clause to both devises; for (treating it as a clause of remainder or gift over) it was equally applicable to both? There were several reasons why such a provision was most needed, and most important, with reference to daughters who might die in the widow’s lifetime. Yet, if the preceding gift—of which this was a qualification—was applicable only to such daughters as should survive their mother, this provision would be confined to those cases in which it would be the least necessary; which would be to impute to the testator an intention both contrary to the context of his will, and in itself improbable; for it is to be observed, that there is no provision in the will, unless this be one, for the children of a child dying in the widow’s life, and no power given to the widow to provide against

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such an accident. This provision was called in the courts below a "substitutionary clause." It is submitted that it was a clause in the nature of a remainder; that it would operate as a substitution in the case of a daughter dying in her mother's lifetime leaving children, but would equally operate in the case of a daughter so dying after her mother's death; and being confined by its language to the gift in which the objects are called "surviving female children," in contradistinction to that in which they were called "then surviving children;" the more proper construction is to consider the clause as pointing first and mainly to the very case which happened—the death of a daughter leaving children in the widow's lifetime.

The distinction between a substitutionary clause and a remainder, is, that under the former each party would take the same quantity of interest—supposing the testator's children not to take vested interests until the death of their mother—if one of them die leaving issue, which issue is in existence when the mother dies, then the grandchildren take their parent's share. The effect of a remainder would be, that, at whatever time the daughter dies, if she leaves issue, the issue succeed to her share. It is necessary to observe the language of the will. It is not "*in case of* the decease of the children," but "*on the decease of* these children," importing that at whatever time the decease might happen, then the child should take the share of the mother. That affords a very strong argument that the testator intended to give vested interests, during his widow's lifetime, to be enjoyed by the daughters after the death of their mother; to be enjoyed by them during their lives, and, upon their death, to go, by way of remainder, to their children.

The language of the will is, that the previous gift to the "then surviving children," is "independent of the rental of my said estates." The word, "independent,"

there must mean, "with the exception of" the rental; it cannot mean that the same persons are to take both the gifts. It is sometimes said, "I give such an estate, independent of another estate," meaning an addition, and that both estates should be held together. But here, it is obvious, from the terms used, that the testator intended the word "independent" to be in the sense of "except." He excepts, out of the generality of the preceding gift, these estates, which he meant to go to his daughters. One part of the property was to go to the widow for her life, and afterwards to the children living at her death, but the other part, "the rental of his estates," he gave to his "surviving female children," a difference of language which was intended to establish a difference in the nature of the bequests. "Surviving" is not a conclusive expression; however, it has been held in many cases to mean, surviving at the testator's death, as in *Doe v. Prigg* (d), in which Mr. Justice Bayley said, "where you can give a vested interest, it is the habit of the law to give it as early as possible, and therefore to make a vested interest in such children as are living at the testator's death, and not to wait until the death of the tenant for life."

The terms in which the annuity to Mrs. *Johnstone* is mentioned, "which I do hereby likewise provide for, to be paid quarterly," indicate an intention to give present gifts to the other daughters, to take effect on the testator's death, and not on his widow's. The clause making provision for the children of the daughters, "on the decease of any of these children," not "if," or "in case of the decease," shows that the testator did not intend the event to be a condition, such as the survivorship of his widow, but that the provision for each donee should, on her death, go immediately to her children, and that construction applies to the children of Mrs. *Wordsworth*, on whose

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death, without reference to any other event, it is submitted, they became entitled to her share of the rental of the testator's estates.

There is no head of the law on which there is a greater number of conflicting cases, or in which more nice distinctions have been made than on the term "surviving," as applicable to real and to personal estates. For a long time, words of survivorship, as applicable to both species of property, were held to refer to the death of the testator. That doctrine was subsequently broken in upon, with respect to personal estate, but is not yet entirely abandoned as to real estate, though there are conflicting decisions. In *Rose v. Hill* (e), a devise of real estates to the testator's wife for life, and after her decease, to his five children, by name, and to the survivors and survivor of them, was held to carry the property to such of the children as survived the testator. There is no reason for putting a different construction on the words used by the testator in the present case. Probably some of his daughters had died before the will, or he might contemplate the death of some afterwards during his own life. This view is supported by the case of *Wilson v. Bayly* (f), in which this House, reversing a decree of the *Irish* Chancery, adjudged that each of the daughters surviving the testator took a vested interest in a third share of leaseholds, which, on her death, before the contingency—the death of two brothers without issue—happened, was transmissible to her representatives. It is evident that the House in that case considered the words of survivorship to refer to the death of the testator. It is most material to contrast that case with *Cripps v. Wolcott* (g), in which Sir J. Leach held the survivorship to refer to the death of the tenant for life, the period of distribution. It does not appear that Sir J. Leach had the advantage of having

(e) 3 Burr. 1881.

(f) 3 Bro. P. Cas. 195.

(g) 4 Madd. 11.

the case of *Wilson v. Bayly* brought to his attention. Nor does it appear that it was cited in this case, in either of the Courts below, which therefore, as well as Sir *J. Leach* in *Cripps v. Wolcott*, have unconsciously overlooked that solemn decision of this House.

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The cases on this point are very numerous, but there cannot be a stronger authority for the appellants' construction than the case of *Doe v. Prigg (e)*, in which many of the previous cases are brought together and reviewed in the judgment of the Court, delivered by Mr. *Justice Bayley*.

Suppose the parts of the clause were transposed thus :—
 “ I give the rental of my estates”—no matter whether in possession or after the death of his wife—“ to my surviving female children, independent of the profits of my brewery and the property connected with it, which I give, at my wife's death, to my then surviving children ;” would not the words “ surviving female children,” brought to the attention in that way, clearly mean such female children as were living at the time the testator made his will, or, at all events, at his death ? The opinion of the Lord Chancellor, that the contrast and juxtaposition of the words “ then surviving,” and “ surviving” repeated in the next line without “ then,” showed that the same event was referred to in both the passages, was founded on the judgment of Sir *W. Grant*, in *Daniell v. Daniell (f)*. It may be said of that case, first, that it was certainly a strong decision ; and, secondly, that it was very different from this, in which a fair comparison and contrast of the two portions of the gift lead to the inference, that the word “ surviving” in the second portion was not intended to express “ living at the widow's death,” which was the meaning of the words “ then surviving” in the first portion. And as it is not probable that the expression “ surviving female children,” with the clause of substitution, or rather of remainder, added to it, was used with

(e) 8 Barn. & C. 231.

(f) 6 Ves. 297.

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reference to such female children as should survive the widow, but rather to such as should survive the testator, but die in the lifetime of his widow; that construction ought to be given to it, and then it would take in the appellants' mother. It was not argued in the Court below, nor is it *necessary* to contend here, that the widow did not take a life interest in "the rental," although the will on the face of it makes that a doubtful point; but, in either way, whether the daughters were to take in possession or in remainder, they were to take a vested interest for their lives, with remainder to their children. The object of the provision carrying over the shares of the daughters on their death to their children, was to provide for the accident of the death of a daughter at some period contemplated by the testator, most probably within, and not after, the widow's life time. The word "surviving" did not cause the vesting of the legacies in the children or female children to be contingent on their outliving the testator's widow, but pointed out when that interest should become one in actual possession, and did not prevent these legacies having vested previously to the widow's death, and consequently passing to the issue of these children or female children, supposing them to die in the lifetime of the widow. There is sufficient in the will to show an intention that these legacies should so vest.

There are authorities and principles which fully justify the adoption of the construction contended for by the appellants. It is material to remember, that the decision in *Cripps v. Wolcott*, which is supposed to have turned the current of authority, was pronounced in ignorance of the decision of this House in *Wilson v. Bayly*, which is a governing authority, not to be overturned by a decision of an inferior court.

Mr. *Rolt* on the same side :—

The principal question is, to what period is the survi-

vorship to be referred in the gift to "my surviving female children." There is a manifest difference between the words "my surviving children" and "the survivors and survivor of my children?" If the former words be read without reference to the context—which is a proper and legitimate mode of construing a will—they mean my children who shall survive me; the period to which the survivorship refers is inherent in the very words, that is, the death of the testator; and so it was held in *Doe v. Prigg* (g), as already stated. The only other case in which that form of expression is found, is *Taylor v. Beverley* (h), which has no other application to the present case. The usual words in wills are "the survivors and survivor" of the class, as in *Roebuck v. Dean* (i), *Brograve v. Winder* (k), *Maberly v. Strode* (l), *Perry v. Woods* (m), *Russell v. Long* (n), *Daniell v. Daniell* (o), *Browne v. Bigg* (p), *Newton v. Ayscough* (q), *Cripps v. Wolcott* (r), *Gibbs v. Tait* (s), and *Williams v. Tarlt* (t). (He stated and commented on these cases, and showed why some of them received a construction adverse to that contended for by the appellants.)

It is apparent on the face of the will that the testator intended a separation of his trade property from his general property, which last produced "the rental;" and supposing, for the sake of the argument, that he gave his wife a life estate in both—but not abandoning Mr. Hodgson's argument, that she took no interest in "the rental"—and reading the words "my surviving female children" in connection and contrast with the preceding "my *then* surviving children," do we not find a manifest differ-

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| (g) 8 Barn. & C. 231. | (o) 6 Ves. 297. |
| (h) 1 Collyer, 108. | (p) 7 Ves. 279. |
| (i) 2 Ves., Jun., 265. | (q) 19 Ves. 534. |
| (k) 2 Ves., Jun., 634. | (r) 4 Madd. 11. |
| (l) 3 Ves. 450. | (s) 8 Sim. 132. |
| (m) 3 Ves. 204. | (t) 2 Collyer, 85. |
| (n) 4 Ves. 551. | |

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ence between the two gifts, the second being an exception of part of the property first given? "Independent of the rental" must be held to mean "excepting the rental;" so that there are two distinct gifts in different forms of expression. It cannot be said that the words "my surviving children," naturally and necessarily mean "my then surviving children." Why should it be inferred that a testator in using different forms of expression in gifts to different classes of persons, intended limitations of both on the same event? Is not the contrary the more natural inference, especially when the event expressed in the one gift is omitted in the other? We have no right to supply in the second gift an expression which the testator omitted. In *Daniell v. Daniell* (u), the leading authority cited in the court below for construing two gifts in different forms of expression to be to the same class, the same expressions could not be applied to both gifts, one being given under a power, the other a gift of the testator's own property, which was a sufficient reason for the difference of expression in respect to gifts in all other respects identical. That case therefore is quite consistent with the construction for which the appellants contend, and also with the case of *Perry v. Woods* (v), in which, there being two gifts to different classes, as in the present case, the Court held that the period of survivorship fixed for one of them was not necessarily the period to which the survivorship in the other was to be referred. The authority of *Perry v. Woods* is recognised by Sir W. Grant in *Newton v. Ayscough* (w), saying, "In *Perry v. Woods* the testator had by his will furnished evidence of his own intention with regard to the meaning of the word 'survivor.' Where he meant the survivorship to refer to the death of the tenant for life, he expressly declared that intention in two instances; and the omission of that reference in another in-

(u) 6 Ves. 297.

(w) 19 Ves. 537.

(v) 3 Ves. 204.

stance, is an indication of a different intention." That observation is expressly in point here. Where two expressions occur in a will, each relating to survivorship, one pointing to a survivorship at a definite period, the death of the tenant for life, the other not referring to any period; is the juxta-position of the expressions to have the effect of controlling the latter expression, and supplying words which the testator did not use? When we find the testator has used a clear and definite expression in the one gift, which exactly measures his meaning, and has omitted that expression in the other, is it not compulsory on us to say, that as he used language so different, we are not to alter it or supply the deficiency? So far as this juxta-position has any effect, it has this only, that the one gift is to be considered different from the other, because, in fact, the language is different. Where the testator meant survivorship to refer to the death of the tenant for life, he expressly declared that intention, and the omission of that reference in the limitation of another gift is an indication of a different intention.

It is necessary to impress on the House that there are two distinct gifts to different classes; there are two species of property—the trade property, and the general property—and the wife is the tenant for life of both—let that be supposed. The parties who are to take in remainder are different; the trade property is given to the surviving *children*; sons are let in for that as well as daughters: that is one class of persons. The general property is given to the surviving *female children*, to daughters only, that is the other class. The testator intended the survivorship with respect to the one class, his children, sons and daughters, to refer to the death of the tenant for life. The distinct property which he gave to the other class, his daughters, he limited to them to be vested in them at his own death. It is idle to speculate on his motives; the question is whether he has not given to two distinct

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classes of persons, and whether he has not used distinct language in his gifts to those two classes? We find the trade property given to the sons and daughters; the general property given to the daughters only. We find the trade property given to the sons and daughters living at the death of the wife; we find the general property given to the surviving daughters, that is, surviving himself, for he says, "my surviving female children." When your Lordships find two distinct species of property thus given to two distinct classes of persons, you will, if you affirm the order under appeal, unquestionably overrule *Perry v. Woods*, overruling at the same time what Sir *William Grant* said of it in *Newton v. Ascough*, "that it is a sound rule of construction, if you find two gifts to two classes of persons, and the form of expression in the one gift is different from the expression used in the gift to the other; you are not to say that, because they are in some respects alike, they are the same in each; but the effect of the contrast is to lead you to conclude that the testator meant a different thing when he said a different thing: that in the one case he meant to give to the children living at the death of the wife, and in the other he did not mean that, because he did not say it." But we find other differences between these two gifts, the one gift being a gift absolute to the children generally, while the other, the gift of the general property to the daughters, is a gift to them for life only. That is a material difference, and when we find the testator making an entirely different series of limitations in the property given, we may naturally suppose that he intended different periods or events upon which they were to vest. There is no limitation over of the gift of the trade property, for the testator, after giving the general property and capital in trade to his wife, then says, "but nevertheless in trust at her death for my then surviving children, share and share alike, independent of the rental of my said estates which

I give and bequeath to my surviving female children." So that the gift of the trade property to the then surviving children is an absolute gift. There is nothing more said to cut down the interest to the children surviving at the death of the wife, to a life estate—it is an absolute interest; not so with respect to the general property; "the rental of my said estates," that is given to his surviving female children, to be paid them as follows: he fixes the times of payment, and then says, "on the decease of any of *these* children, should they die without issue lawfully begotten, that share to fall to the rest, and so on to the last female child." That limitation, or remainder, as it may be more properly described, shows that a life estate only in the general property was given to the female children. One may easily conceive reasons for giving the trade property absolutely to the survivors of the children after the wife's death, excluding the children of such of them as should die in the lifetime of the tenant for life. It would be inconvenient to let infants come into the management of that property. But that would not apply to "the rental," the general property which he gave to his daughters, and, on the decease of any of them, to her children. That property could be as well enjoyed by infants as by adults.

By the construction put by the appellants on the terms of the gift of the general property, every part of the context is in harmony; the remainder over—which was erroneously argued in the Courts below, as a substitution—fits in exactly with that construction; so that the circumstances of the case—the force of the words and of the context—enable the House to dispose of it without reference to the doctrines discussed in *Cripps v. Wolcott*. That case, however, is directly opposed to the decision of this House in *Wilson v. Bayly*, and has not been unreservedly adopted by any judge. Sir *J. Leach* there said, he "considered it to be settled that if a legacy be given to

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two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, the survivorship is to be referred to the period of division" (*w*). How and when was it "settled?" In all the prior cases, as *Stringer v. Phillips* (*x*), *Roebuck v. Dean* (*y*), *Maberly v. Strode* (*z*), *Perry v. Woods* (*a*), *Brown v. Bigg* (*b*), and many others, the survivorship was held to refer to the death of the testator: those cases, in which it was referred to the death of a tenant for life, were distinguished by a direction to trustees, after the death of the tenant for life, to sell the property and divide the money arising from the sale among persons named, and the survivors of them; *Brograve v. Winder* (*c*), *Newton v. Ayscough* (*d*), *Hoghton v. Whitgreave* (*e*). In *Russell v. Long* (*f*), and *Jenour v. Jenour* (*g*), to which Sir *J. Leach* referred for the principle of his decision, there was no question as to the death of the parties in the life time of the tenant for life, and they were not cases applicable to *Cripps v. Wolcott*, or to this case. Some cases subsequent to *Cripps v. Wolcott*, decided the same way, did not add to its authority, as *Pope v. Whitcombe* (*h*), *Gibbs v. Tait* (*i*), and *Williams v. Tarrt* (*k*), and they are opposed to *Doe v. Prigg* (*l*), which followed *Wilson v. Bayly*. The only difference between that case and this is, that that related to realty, this to personalty. In *Bindon v. Lord Suffolk* (*m*), the House of Lords found a special intent in the will, and then referred the survivorship to that period.

(*w*) 4 Madd. 15.

(*x*) 1 Eq. Cas. Abr. 292.

(*y*) 2 Ves., junr. 265.

(*z*) 3 Ves. 450.

(*a*) 3 Ves. 204.

(*b*) 7 Ves. 279.

(*c*) 2 Ves., junr. 634.

(*d*) 19 Ves. 534.

(*e*) 1 Jac. & W. 146.

(*f*) 4 Ves. 551.

(*g*) 10 Ves. 562.

(*h*) 3 Russ. 124.

(*i*) 8 Sim. 132.

(*k*) 2 Collyer, 85.

(*l*) 8 Barn. & C. 231.

(*m*) 4 Bro. P. C. 574.

Mr. *Turner* and Mr. *Bethell* for the respondents, in the course of their arguments;—which it is unnecessary to report, as they coincide with the two judgments reported in 2 Beav. 25, and 4 Myl. & C. 644—cited and commented on the cases there mentioned, and also *Hawes v. Hawes* (n), *Batsford v. Kebbell* (o), *Rose v. Hill* (p), *Leaming v. Sherratt* (q), *Taylor v. Beverley* (r), and insisted that the case of *Wilson v. Bayly* (s), so much relied on for the appellants, would, upon examination of it, be found in favor of the respondents, and that the judgment in *Doe v. Prigg* was founded on a misconception of that case.

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Mr. *Hodgson*, in reply, contended that the bequest of the rental to the surviving female children was an absolute gift for life to such of them as should survive the testator, even if it must be held that it was not to take effect in possession until the widow's death.

Lord *Brougham*.—This case comes before your Lordships upon an appeal from two consecutive orders of the Court of Chancery, one pronounced by the present learned Master of the Rolls, and the other by my noble and learned friend on the woolsack, on an appeal from the order of the Master of the Rolls. These orders allowed a demurrer to a bill which was filed to establish the trusts of a will, the demurrer having been for multifariousness and for want of equity. I see by the printed cases that the parties demurring abandoned the demurrer on the ground of multifariousness; but so far as it went upon the want of equity, it was allowed; the result of which is that a construction has been put upon the clause of the will which has been before your Lordships in argument,

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(n) 1 Ves., senr., 14.

(q) 2 Hare, 14.

(o) 3 Ves., jun., 365.

(r) 1 Collyer, 108.

(p) 3 Burr. 1881.

(s) 3 Bro. P. C. 194.

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and to dispose of which construction now only remains for your Lordships.

The clause was, "As also I leave, give, and bequeath to my said dear wife, all my capital in trade, with the three-quarters of the profits arising therefrom for her life; but nevertheless in trust, at her death, for my then surviving children, share and share alike, independent of the rental of my said estates, which I give and bequeath to my surviving female children, to be paid them as follows"—omitting the word "then" which had been introduced into the preceding part of the clause, to qualify the words "surviving children," and which created an undoubted relation between the survivorship there referred to, and the determination of the life estate immediately preceding, given to the widow in the capital, with the three-quarters of the profits arising therefrom given for her life.

The question, therefore, is the shortest and the plainest in its terms that can well be imagined, for it only is, whether we are to take the words in the latter part of the clause, "my surviving female children," with or without the word "then," which had been prefixed to the words "surviving children" in the preceding part of the clause. Both the Master of the Rolls in allowing the demurrer, and my noble and learned friend in affirming that allowance, considered that the words "my surviving female children," in the latter part, referred to the same period to which were referred the words "the then surviving children, share and share alike," in the former part of the clause; and, upon the best consideration which I have been able to give to the construction of this clause, and to the very able argument before us on the part both of the appellants and of the respondents, I feel no hesitation in arriving at the same conclusion to which both of the learned judges in the Court below came, namely, that the period of survivorship referred to in connection with the gift to the female children in the latter part of

the clause, is the period given to the survivorship of the children in the first part of the clause, that is, the determination of the life estate given to the widow.

I consider in the first place, that it is impossible for your Lordships to separate this into two distinct clauses or parts of the will, as if dealing first with one matter, and then with another unconnected matter. I cannot so read the clause as to consider that there is this difference between the two branches, and that you are to take it as if the testator first dealt with one subject matter in one way, and afterwards, without any immediate connection with the preceding matter, wherewithal he had dealt, that he was dealing with another separate subject matter. I take this to be one and the same clause, and it being so, very much aids the construction; because when a person has already specified his intention clearly, and in a manner to leave no doubt or difficulty, and upon which no dispute can be raised, he, in the same clause, in the continuance of it, in the remaining part of that portion of the provision of his will, naturally applies himself in the same manner to the subject matter, although he may not use precisely the same expression, and the close juxta-position of the two clauses making one, accounts for his not repeating in the second, the very same words of which he has made use in the first part.

Then I think that upon all principles—not only the principles uniformly adopted in such cases, not only the principles upon which the Courts have always proceeded in dealing with such questions, but upon the plain principle of common sense—the last conclusion which you are apt to come to in considering what a testator meant when he talked of surviving persons, of surviving children, or of other surviving parties; the last construction which you adopt, and which you only come to when there is something that drives you to it in the words, is that he meant

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17. the survivorship to refer to the period of his own decease,
DS- because every gift to a legatee, whether a child or other
TH person, assumes, *ex vi termini*, that the party to take is
ID a party surviving the giver of the gift, the testator. If in
my will I give a legacy to A. B., I need not say "at my
decease," because it is, of course, that my will is to op-
erate only at my decease; otherwise it would be a gift
inter vivos. I need not say when I give to A. B., "I
give to A. B. in case he survives;" that is assumed, be-
cause my will is to speak at the time of my decease. It
is then, and then alone, that it can begin to have any
effect, and, therefore, it is with a view to that period
alone that I must be taken to apply myself in whatever
expressions I use indicating the party who is to take,
because I am supposed to be speaking, as it were, at the
time of my decease, and to be arranging that which is to
happen upon my decease. If, therefore, I mean that A. B. is
to take in case he survives me, which no doubt I do mean,
I assume that he is to survive me, and accordingly in all
the cases (there are some exceptions to be pointed
out, but they were altered upon appeal), in all those
cases the presumption is that when "surviving" is men-
tioned, the surviving the testator is not the kind of sur-
vivorship which is meant, unless it is clearly shown that
the testator did so mean, and that he used words which
were totally superfluous. Otherwise in talking of survivor-
ship he must mean some survivorship after another person
than himself, or some survivorship relating to another
period of time than his own decease.

The case of *Cripps v. Wolcott* was referred to, which
has never been overruled, which has never been materially
doubted, though, indeed, there is found one decision of
the same learned judge, that is incompatible with it (a).
That contradictory decision was overruled, and it was over-

(a) See *Home v. Pillans*, 2 Myl. & K. 15.

ruled very mainly upon the ground of its being totally at variance not only with all the other cases, but with *Cripps v. Wolcott*, and I agree with those who say that when Lord *Eldon* in the latter end of 1827, sent to the registrar his written judgment deciding a case (*b*) in which *Cripps v. Wolcott* had been cited in the argument, if he had disapproved of *Cripps v. Wolcott*, if he had held a totally different opinion upon that case he would have said so; but the case of *Cripps v. Wolcott* was referred to in that case, was argued upon mainly in that case as supporting the decision, and Lord *Eldon* does not appear to have taken any unfavourable notice of it in the argument which he used in support of the decision which he then gave and sent to the registrar.

I therefore take it to be clear, that we are not, without the most plain and manifest necessity, to be driven to consider that the testator, when he uses the words "surviving children," means children surviving himself. If indeed, there is no other period pointed out, either in that part of his will or in any other part to it, to which the word "surviving" can be referred; if it is clear that you can find no other period of time to which that word "surviving," or other words indicating survivorship can refer, then, going upon the common principle of giving effect to all the words which a man uses in his instrument, you must, whether you will or no, be driven to that conclusion, but, undoubtedly, it is not a natural one, and it is not one to which we should willingly come.

Now, is there, in this will, another period to which the words "surviving," &c., can be referred? Not only is there another period in the subject matter connected with the words in question, but there is another period in the same clause, immediately preceding the words in question, and giving the same parties an interest—a period already taken,

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(b) *Pope v. Whitcombe*, 3 Russ. 124.

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during which the estate, namely, the "capital and the three quarters of the profits arising therefrom," is given to the widow for her life, "but, nevertheless, in trust at her death for my then surviving children, independent of the rental of my said estates, which I give and bequeath to my surviving female children." I take it then that this refers to the immediately preceding period of time mentioned by the word "then," that is, surviving at the determination of the life estate, at the widow's death, the period immediately preceding, and which is referred to by the word "then" being admitted, in the whole argument on both sides, to be connected with her death, and with no other period.

A case was referred to of *Doe v. Prigg* (p), and the reasons given by the very learned judge who pronounced that decision do not appear very clearly to support it: I believe it is pretty certain that the reasons have not given satisfaction in Westminster Hall. I do not say that the arguments on the part of the appellants here cannot stand without the case of *Doe v. Prigg*, nevertheless, both here and in the Court below, that case, it must be observed, was very much relied upon for the construction against the demurrer, which was allowed.

I have no doubt that a sound view has been taken in the Court below of this clause in the will, that it is one and the same clause, and that the demurrer proceeding upon that ground was properly allowed, I therefore move your Lordships that you affirm the orders of the Court below, and with costs. And my reason for saying "with costs," is this: the case was held to be doubtful enough in the Courts below, to justify the learned judges in both those Courts, not to fix the costs upon the party against whom they decided; but I do not consider that we should do well if we adopted in this House, which is the last resort, anything like a rule of disallowing the costs of

appeal, when we have no doubt on the grounds of our decision, merely because there were doubts sufficient to induce both the learned judges below in giving their judgments, to refuse the costs. I think it would be a perilous principle to lay down, and it is one upon which we never proceed, having really no doubt. On the question of costs it is to be observed that, as it stood below before the Lord Chancellor, there was then only the opinion of one judge; the Master of the Rolls was appealed from, and as there might be doubts there sufficient to justify an appeal to my noble and learned friend on the woolsack, he did not allow costs. But that argument fails when there are two judges consecutively of the same opinion; and I beg to observe that I cannot find in the judgment of my noble and learned friend, affirming the judgment of the Master of the Rolls, that he expressed any material doubt, except in so far that he thought there had been doubt enough in the Rolls Court, before the case came to him, to justify him in refusing the costs. When there are two consecutive judgments in this way I do not think that we ought to have any hesitation in abiding by the general rule, and giving the costs of the appeal. I therefore, in moving that your Lordships should affirm the order of the Court below, move also that it be affirmed with costs.

Lord Campbell.—I regret very much that I feel myself bound to come to the same conclusion. I should have been very glad, if consistently with the rules by which wills are to be construed, we could find any ground upon which these children should have a provision made for them, and probably the testator would be very much surprised if he found that they were wholly unprovided for; but as he has expressed his intention only by the words which he has used, we must construe the will which he has made, and we cannot make a will for him.

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It seems to me that the doctrine of the case of *Cripps v. Wolcott* does not arise here. When the same question does arise at your Lordships' bar, I think it will be for your Lordships to determine whether that case is or is not consistent with the former decisions of this House, upon which I will not now give any opinion. It seems to me that neither *Cripps v. Wolcott*, nor any of the cases that have been cited, throw any light upon this case.

With regard to the first part of this clause, no question arises, because the word "then" excludes all notions of our looking to the death of the testator as the period when the survivorship is to be ascertained. Therefore we need not at all refer to any authorities to construe that part of the clause, because the words are "for her life, but nevertheless in trust at her death for my *then* surviving children," which language certainly means, the children surviving at her death. But the real question is, whether, according to the language used, it is a new class to whom a benefit is afterwards given, or whether it is only a portion of the preceeding class. Now, it appears to me upon the natural and best construction which I can put upon these words, that they do not introduce a new class, but that they only limit the benefit of the estates which are here mentioned. The words are, "independent of the rental of my *said* estates, which I give and bequeath to my surviving female children." There it seems to me that the testator only means a portion of that class whom he has before described. If that be so, the class whom he had before described are those who are to survive the mother. That therefore excludes those who are to die in the life time of the mother. We want therefore, no canon of construction, except that you are to put upon words the natural and grammatical meaning, unless there be something to show that a different meaning is to be attached to them. I think therefore, looking at the word "then" that it is necessarily implied, and that the effect of it is carried

n to the "surviving female children." Upon that part of the case I have a very strong opinion. I own that I was at first struck with what might be the effect of what is called the substitution clause, and that it is possible in a will so very inartificially drawn, although there was to be no vested interest in the daughters until the death of the mother, that upon the death of a daughter in the life time of the mother leaving children, an interest might be given to those children. That depends upon whether "the children" shall mean *all* the children, or only the children to whom an interest was before given. I certainly at first, had some doubt on that subject, but on further reflection it seems to me that this is not a substitution clause, placing the children in the place of the parent, but that it is rather in the nature of a remainder clause, that of those who died having a portion, their portion was to go over to the children. We must of course look to the record and see how the will is set out. This coming on upon demurrer, we must consider in our judgments the words which the testator has used according to the bill, but I cannot help in my own mind considering that there is a word in the will which would exclude all doubt and all argument, because in the will it is "these," and not "the" (a). But supposing it to be "the," I think the proper construction upon that word to be the same which was considered by the Master of the Rolls and by the Lord Chancellor, and therefore I think it must be limited to those children in whom an interest is vested, and as no interest vested in the daughter dying in the lifetime of the

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(a) A doubt arose in the course of the argument whether, in the clause, "on the decease of any of *the* children," &c., "these" was not the word used by the testator; and so it appeared on production of the original will; but the bill, copying the clause from the probate, had "the;" and their Lordships held that, as the question came before them on demurrer to the will, they should take the word to be "the."

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mother, her interest is determined and therefore the appellants are not entitled to her share.

With regard to the costs, I very reluctantly coincide with the opinion of my noble and learned friend. It seems to me that as this was a will of a very inartificial nature, and that as doubts arose upon the construction of a will so inartificially drawn, it was very fair that the opinion of the Lord Chancellor should be taken as well as the opinion of the Master of the Rolls ; but really I think the appellants ought to have been satisfied with that, and I therefore feel myself obliged to come to the conclusion, that this order should be affirmed with costs.

The Lord Chancellor.—This being an appeal from a decision of the Court of Chancery at the time when I presided in that Court, I was very anxious to hear the opinions of the noble and learned lords before I expressed an opinion of my own. Having heard those opinions, and having very carefully attended to the arguments at the bar, I do not see any reason to alter my former opinion upon this case, and with respect to the question of costs, I agree with my noble and learned friends that the judgment should be affirmed, with costs.

The orders appealed from were accordingly affirmed, with costs.

BROOKS' Divorce Bill.

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The wife's general bad conduct admitted as an excuse for the husband's omitting to bring an action against the adulterer. *Divorce. Action for damages. Lapse of time.*

A lapse of eight years from the discovery of the wife's adultery till the petition for a divorce was presented, sufficiently accounted for by the husband's inability to bear the expenses of a divorce bill.

It appeared, from the evidence taken on the second reading of this bill, that the parties were married in 1834, and lived together till 1838, when an alteration was observed in the wife's conduct, in consequence of "her unfortunate propensity to drinking wines and spirits." It was suggested that she might derive some benefit from a sojourn at *Gravesend*, and her uncle, who was also her husband's uncle, accompanied and left her there. It was soon afterwards discovered that she carried on an adulterous intercourse with a Mr. M., a person of substance, living at *Gillingham*, in *Kent*, whom, according to her own admission, she met in the boat that took her to *Gravesend*.

The husband on that discovery ceased to live with her: he commenced immediately a suit for a divorce in Doctors' Commons, which he obtained in due course; but did not bring an action against the adulterer, because it was the opinion of his brother and solicitor that the wife's "general conduct was so bad, that it would not be advisable to bring an action." His circumstances from that time (1830) to this (1847), would not bear the expenses of a divorce bill.

The bill was read a second time, and afterwards passed.

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July 8.	JAMES WHITE and others	-	-	-	<i>Respondents.</i>

Bill of review. To sustain a bill of review proceeding on facts discovered subsequent to the decree complained of, it must be shewn that leave of the court to file it was regularly obtained.

To sustain a bill of review for error apparent on the decree complained of, it is not enough that it contains allegations that the decree is erroneous, but error must be shewn on the face of it.



THE appellant commenced the business of an hotel-keeper in *Dublin* in 1832, in a house and premises held by him from a Mr. *Milliken*, one of the respondents, for a term of thirty years; and in 1833, being indebted to several persons, he demised the hotel, and assigned the furniture, plate, linen, &c., to *James White* and two others, respondents, upon trust for the benefit of the creditors. The trust deed contained covenants to the effect that the appellant should continue for five years and eight months to manage the hotel (on the assumption that the debts would be paid in that time); and in case he should not pay due attention to the business, the trustees might, after giving him three months' notice, sell his interest in the term, dispose of the furniture, plate, &c., and divide the proceeds among the creditors. Differences soon arose between the appellant and the trustees, who, in *April* 1834, filed a bill against him, charging various breaches of his said covenants, and praying that they might be at liberty to sell the hotel and trust property, and for a receiver and an account, &c. The cause came to hearing in *January* 1835, before the Lord Chancellor, who made a decree according to the prayer of the bill. The appellant

then filed a cross-bill, or bill of review and supplement, against the trustees, besides other proceedings (a); and against the orders made on them, he, in 1839, brought an appeal to this House, which dismissed the same, and remitted him back to the Court of Chancery in *Ireland* (b).

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It did not appear by the appellant's printed cases what proceedings, or whether any, were taken by him from 1839 till 1844, when he filed a new bill against the trustees and *Milliken*, the landlord, purporting to be "a bill of review and reversal," in which he stated the said bill by the trustees, his answer thereto, the decree, and the Master's report in pursuance thereof, and the decree on the merits, also stating the intermediate and subsequent proceedings in that cause, by way of supplement, and with leave of the court, and alleging and charging many irregularities all through them, and various errors in law and fact in the decree of *January* 1835, and that it was based on fraud, corruption, collusion, and misrepresentation of the trustees, aided by the co-operation of the appellant's law agents, but which he did not discover until 1837.

One of the errors charged by this bill was that the decree directed a sale of the hotel and effects therein, "whereas the appellant faithfully performed his covenants:" another was, that as by the deed of 1838, it was stipulated that the appellant should have the management of the hotel for five years and eight months, for the purpose of paying his creditors out of the profits, the Court had not in 1835 acquired jurisdiction over the property, so as to vary the said deed and direct a sale. And finally, the appellant submitted and insisted "that error is apparent upon the face of the said decree, inasmuch as it thereby appears that only a portion of your suppliant's evidence was read on the hearing of the said

(a) 6 Ir. Eq. Rep. 303.

(b) 6 Clark & Fin. 786.

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cause; and that the said decree recites that such decree was pronounced by your Lordship upon full debate of the matter, which was not the case, as a great portion of your suppliant's evidence was not read, and which practice is contrary to all principles of equity; and your suppliant charges, that the said decree is further erroneous, inasmuch as, if the whole of your suppliant's case had been submitted to your Lordship at the hearing of the said cause, the same does not appear on the face of the said decree." The bill prayed for a re-hearing of the cause, and a reversal of said decree.

The respondents, *White* and the other trustees, put in a demurrer to the bill, for want of equity and other causes, and the respondent *Milliken* put in a like demurrer.

Both demurrers were heard by the Master of the Rolls, and allowed, with costs, by an order dated the 30th *January*, 1845; which was affirmed on appeal by the Lord Chancellor by an order dated the 14th *February*, the same year.

The present appeal was against these orders, and also against the decree of 30th *January*, 1835.

The appellant undertook to argue his own case (c).

(c) It was impossible to arrange the appellant's statements into the form of an argument. The reasons subjoined to his case, signed by Mr. *C. P. Cooper* and Mr. *Billon*, were, "1st., because the decree of *January* 1835 is contrary to the terms of the trust deed *May* 1833; and, in particular, that no sale ought to have been directed to be made of the hotel and trust property until the failure of a certain income within a given time, which time had not arrived when the decree was pronounced; and because, if such time had arrived, and such income had not been produced, no such sale should have been directed to be made, unless such failure had been caused by the act or misconduct

There was no counsel or agent for any of the respondents, nor did it appear that they lodged cases or put in answers to the appeal.

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The Lord Chancellor.—It is much to be regretted that the appellant, not appearing by counsel, has not been able to put your Lordships fully in possession of the facts :

of appellant; 2d., because it was provided by the said deed, that if the time should have arrived when the trustees might claim to sell the hotel and property, then three months' notice in writing of their intention to sell should have been served on the appellant, whereas no valid notice had in fact been served, or if it had, the same had since been waived and made void by the subsequent acts and agreement of the respondents; 3rd., because the deed gave the appellant five years and eight months to carry on the business in the hotel; and if even he had committed a breach of the covenants, but which he submitted he had not, no penal provision was contained in the deed to the effect that a breach of covenants should deprive the appellant of the possession of the hotel, which was secured to him for that period by the deed."

The reasons against the orders allowing the demurrer were, " 1st., because the bill of review distinctly stated and charged that the jurisdiction assumed by the Court of Chancery in *January* 1835 was erroneous in law and equity, and that error in law is apparent upon the said decree; and the bill of review made out a case of fraud and collusion, which called for an exercise of the jurisdiction of the Court, in unkennelling matters of fraud; 2d., because all the proceedings in the cause, wherein the said decree was pronounced, were vexatious, unnecessary, and in direct violation of the terms of the trust deed, and were had by surprise, and were the result of fraud, covin, and misrepresentation; and were instituted by the respondents, plaintiffs in that suit, acting in collusion together and with *Milliken*, co-defendant of appellant in that cause; and the bill of review contained statements and charges to that effect, and, also, further statements and charges, from which it clearly appears, that the appellant was entitled to the discovery and relief thereby prayed, which statements and charges ought to have been taken to be true for the purposes of the demurrers.

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your Lordships can only judge of them from the proceedings which are brought under your consideration by the printed cases. Certain proceedings took place in the Court of Chancery, under which property, to which the appellant was entitled, was decreed to be sold for the purpose of payment of his creditors. By that decree, made in 1835, the rights of the creditors, as they were supposed to exist, were enforced. The appellant brought that decree before this House in the year 1839, irregularly and without advice; the result of which was, that the House was under the necessity of dismissing that appeal. What has taken place from that time to the present does not appear. But ultimately he filed, what has been called a bill of review, the bill appearing on the face of it to be a bill of review; but the appellant on being asked at the bar what kind of bill of review it was intended to be, whether he intended it as a bill of review proceeding upon facts discovered since the decree complained of, or as a bill of review upon error apparent on the face of the decree, his answer was that he proceeded on both. I do not say that it is incompetent to a party to unite both those matters in one bill, but a party cannot file a bill of review upon facts discovered since the decree, without first submitting those facts to the consideration of the Court, and obtaining an order from the Court giving him liberty to file such a bill. It does not appear that such a proceeding has been adopted, or that any such order has been obtained, consequently he is necessarily confined to the other part of the case, namely, to showing that this was a bill of review upon error apparent upon the face of the decree.

When that part of the bill, which alone proceeded to bring forward error in the decree, came to be investigated, it appeared that the allegations were not allegations of error apparent on the face of the decree, but complaints made of the decree itself being erroneous, that is to say,

that the decree ought to have been different from what it was, being in fact that which can only be discussed on appeal, and not being the subject matter of a bill of review.

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In order to satisfy the appellant that this was the rule, and that in confining him to that species of error, the House was only following a rule laid down in other cases, I referred him to the case of *Haig v. Homan* (d), which, amongst other things, decided that "the mere propriety of a former decree cannot be questioned by a bill of review, it is only where error is on the face of it that such a bill can be sustained." All the allegations therefore complaining of a former decision as having been erroneous, not showing that the errors appeared upon the face of the decree itself, were of course matters which the House could not attend to in this appeal. I observe that in moving the judgment of this House in *Haig v. Homan*, I stated, "I have been induced to enter fully into an examination of the proceedings in this case, not from any difficulty in the order to be made, but because many of them, particularly that which has been called a bill of review, show that there has been a want of that precision in these pleadings, and of that accurate view of the principles and practice of Courts of Equity, which is essential to the proper administration of justice (e)."

My Lords, such being the rule of practice, and the appellant having had ample time allowed him to point out allegations in this bill, for the purpose of showing that there was error in the decree, apparent on the face of it, it is a matter of necessity, in order to preserve a uniformity of practice, that the rules laid down for the benefit of suitors, and which cannot be departed from—although the person appealing, on account of his poverty, states his own case—should be adhered to. It is necessary to adhere to the ordinary forms of proceeding; those

(d) 8 Clark and Finnelly, 321.

(e) *Id.*, p. 373.

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forms have not been adhered to, and he has not brought forward such a case by bill of review as would give the Court of Chancery in *Ireland* jurisdiction to investigate the matter. The Court of Chancery was of that opinion, and has acted upon the established practice of the Courts of Equity. I therefore move that the judgment of the Court below be affirmed.

Lord Brougham.—I entirely concur with what has fallen from my noble and learned friend. Although a person who is not possessed of the means of obtaining the assistance of counsel is permitted to appear in person as a suitor, yet it is necessary to adhere, both in the Court below and in the Court of Appeal, to those rules which have been adverted to by my noble and learned friend: else the utmost confusion would take place, and the greatest mischief would result to suitors. Those rules have been framed not for the convenience of the Court, but entirely for the benefit of the suitor. It is necessary that such rules should be laid down, and that when they have been laid down they should be enforced; and to say that, because a man is poor, he should be set free from those rules, would just lead to this, that the rules would soon cease to exist, for every party would be at liberty to plead poverty.

The decree and orders appealed from were then affirmed.

The HONORABLE RICHARD BOOTLE WIL- }
BRAHAM - - - - - } *Appellant.*

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June 24.

CHARLES SCARISBRICK, Esq., and others - *Respondents.*

In construing a will, the words "younger son" used by the testator in a proviso for the shifting, in certain events, of an estate thereby devised, are to be taken in their plain and ordinary sense, as meaning "younger in order of birth," unless it satisfactorily appears from other parts of the will, that they were used by the testator in another sense.

*Will. Shifting clause.
Younger son.*

THIS was an appeal against a decree of the Chancellor of the Duchy Court of *Lancaster* upon the construction of a shifting clause contained in Mr. *Eccleston's* will (the subject of a former appeal) (*a*), and the question was whether the words "younger son," should be construed as meaning "younger in order of birth," or "younger," that is, "posterior" in order of limitation.

The testator, at the date of his will, had seven children living, born in this order:—*Thomas, Ann, Mary, Elizabeth, Catherine, William*, and *Charles* (the respondent); and being seised of or entitled to large real estates in *Lancashire* and elsewhere, he devised them all to *Edward Bootle Wilbraham* and another, on trust, as to those which he called his *Scarisbrick* estate, to convey and assure the same (subject to a term) to the use of his eldest son *Thomas*, for his life, and his first and other sons in tail male, with remainders to *William* and *Charles*, and every subsequently born son of the testator successively, and

(*a*) Sec 5 Clark & Fin., 398.

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their respective first and other sons in tail male ; remainder to the first and other sons of *Thomas* in tail general ; with like remainders to the first and other sons of *William* and *Charles*, and every subsequently born son of the testator ; remainders to the first and other daughters of *Thomas*, *William*, and *Charles*, and of every subsequently born son of testator, respectively and successively in tail ; remainder to the use of testator's daughter *Ann*, for life, and her first and other sons successively, first in tail male, then in tail general ; remainder to her daughters as tenants in common in tail, with similar remainders to the use of *Mary*, *Elizabeth*, and *Catherine*, and every subsequently born daughter of the testator in the order of her birth, and their respective sons and daughters in succession, with other remainders not material to state ; and with proviso that *Thomas* and every person becoming entitled to said estate should take and retain the name and arms of *Scarisbrick* only.

And as to those estates which the testator called his *Wrightington* estate, he directed the trustees to convey and assure them (also subject to a term) to the use of his sons and daughters born and to be born, and their issue, in the same manner as the *Scarisbrick* estate, except that *William*, the second son, and his issue, were to take first and *Thomas* last, of the sons, and *Thomas's* second and other younger sons before his first ; and also that *Mary*, the testator's second daughter, was to take first of the daughters, and *Ann* last. The settlement was to contain a shifting clause to the effect, that if *William* or *Charles*, or any subsequently born son of the testator, or his daughters, *Mary*, *Elizabeth*, or *Catherine*, or any subsequently born daughter, or any issue of his said sons or daughters, should become entitled to the *Scarisbrick* estate, under the limitations before stated, and any younger son or daughter of testator, or any issue of such younger son or daughter should be then living, the uses of the

Wrightington estate to the child, who or whose issue should so become entitled, should cease ; but if that estate should have shifted to *Charles*, or any of the testator's subsequently born sons, or to *Elizabeth* or *Catherine*, or any of his subsequently born daughters, or any issue of the respective bodies of his said sons or daughters, and should there be failure of issue of all his sons or daughters, younger than the son or daughter from whom, or from whose issue, the same should have shifted, then the *Wrightington* estate should return and remain to the uses to which it would have gone if there were no proviso for shifting. This settlement also was to contain a proviso that every person becoming entitled to the *Wrightington* estate, except *Thomas* and his issue, should take and retain the name and arms of *Dicconson*.

And as to the testator's other estates, which he called his *Eccleston* and *Sutton* estates, he directed his trustees by sale or mortgage to raise out of them sums sufficient for paying his debts, legacies, &c., and for securing provisions for his subsequently born sons, and for his daughters : and in case the residue of these estates should not exceed the value of 15,000*l.*, he declared that his trustees should stand seised thereof in trust for his son *Charles*, or any subsequently born son first attaining twenty-one, &c., his heirs, executors, &c., respectively for ever ; and in case the testator should leave only two sons, in trust for the eldest of them, his heirs, executors, &c. But if such residue should exceed the value of 15,000*l.*, the testator directed that the estates should go and remain to the use of his third son, *Charles* (the respondent), and every other subsequently born son of the testator successively in the order of his birth, for his life, and after his decease to his respective first and other sons successively in tail male ; remainder to the use of testator's eldest son, *Thomas*, for life, and after his decease to his first and other sons successively in tail male ; remainder to the use of testator's

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second son, *William*, for life, and after his decease to his first and other sons successively in tail male, with remainder to the testator's first and other sons in tail general, the son or sons of the eldest of them, and their issue, to take before the son or sons of the younger of them, and their issue; remainder to the sons' daughters successively in tail in the like order, remainder to testator's daughters, *Elizabeth*, *Catherine*, and every subsequently born daughter of testator, for life, and their issue in tail general, remainder to testator's first and second daughters, *Ann* and *Mary*, for life, and their respective issue, in such order and for such estates as were before expressed in their regard, as to the *Scarisbrick* estate.

The shifting clause directed to be inserted in the settlement of the *Eccleston* estate, upon which the question in this appeal turns, was to this effect, "that if by virtue of the settlement the said *Charles*, or any of the testator's subsequently born sons, or his daughters, *Elizabeth* and *Catherine*, or any subsequently born daughter, or any issue male of the respective bodies of the testator's said sons or daughters, should become actually entitled to the possession, or to the receipt of the rents of the *Wrightington* estate; and any younger son or daughter of testator, or any issue of such younger son or daughter should be then living, then, and as often as the same should happen, the uses to be limited in the settlement in the hereditaments at *Eccleston* and *Sutton* to the son or daughter who or whose issue should so become entitled as aforesaid, and to his or her issue, should absolutely cease; but that in the proviso for shifting it should be declared that if by virtue thereof the said hereditaments should have shifted to any of testator's other sons or daughters, or issue of their respective bodies, and there should afterwards be a failure of issue of all testator's sons or daughters, who should be younger than the son or daughter from whom, or from whose issue the same should have so shifted as aforesaid, then the said hereditaments at *Eccle-*

*ston* and *Sutton* should return and remain to the uses, and be held in the manner in which the same would have gone and been held if the proviso for shifting the same were not inserted."

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The testator directed various provisions and powers, not material to be here mentioned, to be contained in the settlement; and he appointed the trustees to be his executors. He afterwards made five codicils, by the second of which, dated the 27th *October*, 1809, he bequeathed an additional annuity of 200*l.* to his wife for her life, chargeable, as the annuity given to her by the will was, on the *Scarisbrick* estates; and he gave each of his four daughters an annuity of 100*l.* for their lives, chargeable on the same estate, in addition to the provisions made for them by the will; and he gave his wife a legacy of 200*l.*, and confirmed his will in all respects so far as the same was not "altered by the recent death of his son *William*."

The testator died in *November* 1809, leaving his two sons *Thomas* and *Charles* and four daughters surviving. *William* the second son died shortly before, without issue. *Thomas*, the eldest, upon his father's death, took the name and arms of *Scarisbrick*, and entered into possession of that estate. *Charles* at the same time took the name of *Dicconson*; he was then of the age of nine years. The residue of the *Eccleston* estate, after answering the purposes mentioned in the will, considerably exceeded the value of 15,000*l.*, and therefore became subject to the provisions in the will for settling the same.

The trustees filed a bill in 1815, in the Court of the County Palatine of *Lancaster*, against *Thomas Scarisbrick* and the other surviving children of the testator, praying that the will might be established and carried into execution under the decree of the Court. A decree to that effect was accordingly made, and subsequent proceedings were had in the cause.



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In 1822, *Thomas Scarisbrick* presented a petition in said cause, stating that *Charles*, the second son, had then attained his age of twenty-one years, and became, by the death of *William* without issue, entitled to the *Wrightington* estate for his life; and praying that the *Eccleston* and *Sutton* estates might be conveyed to the use of the petitioner and his issue. The Vice Chancellor of the said Court, by his order, made the 9th *January*, 1823, upon the hearing of the petition, declared that the estates given by the said will to *Charles* and his issue, in the residue of the *Eccleston* and *Sutton* estates, never took effect; and that *Thomas*, in the events which happened, became entitled to the same for his life. It was by the said order referred to the registrar of the Court to make the inquiries necessary for carrying the will into execution, and for proper settlements. No settlement was made.

*Thomas Scarisbrick* died without issue in 1833, having by his will bequeathed his personal estate to his wife, and appointed her and the appellant and another, executors. He had previously charged the *Eccleston* estate with a jointure of 1000*l.* a year for his wife.

Upon the death of *Thomas*, *Charles* took the name of *Scarisbrick*, and entered into possession of that estate; and thereupon his sisters, *Mary* and *Elizabeth*, filed a bill in the Chancery of *England* against the trustees of the will and *Charles Scarisbrick*, insisting that under the provisions of the will, and in the events that happened, the *Wrightington* estate had gone over to *Mary* for her life, and the *Eccleston*, to *Elizabeth*. The final decision in that suit was, that neither of the estates went to a daughter while a son was living; and that *Charles* was, from the death of *Thomas*, entitled for his life to both those estates, and to the *Scarisbrick* estate (*b*).

(*b*) 5 Clark & Finnelly, 398.

Soon after that decision, *Charles Scarisbrick* revived the suit in the Duchy Court of *Lancaster*, and then presented a petition to that Court, praying a reversal of the Vice Chancellor's declaration of *January* 1823, that the estate given to him by the will in the *Eccleston* and *Sutton* estates never took effect. That petition was heard in *May* 1840, by Lord *Holland*, Chancellor of the Duchy Court, assisted by Mr. Justice *Maule* and Mr. Baron *Rolfe*, and an order was made thereon, by which the said declaration of the Vice Chancellor was reversed ; and it was ordered and declared that upon the death of the testator, the petitioner became and was still entitled to the *Eccleston* and *Sutton* estates (c).

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Against that order the surviving executor of *Thomas Scarisbrick* brought this appeal, which was argued in presence of the Judges (Chief Justice *Wilde*, Justices *Cole-ridge*, *Maule*, *Wightman*, *Erle*, and Barons *Alderson*, *Rolfe*, and *Platt*).

(c) Mr. Justice *Maule* delivered the judgment of the Court, which, so far as is material here, was to this effect :

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The object of the appeal is to vary so much of the order of the Vice Chancellor of the County Palatine, dated 9th *January*, 1823, as declares that on the death of the testator in the cause, *Thomas Scarisbrick*, his eldest son, became entitled for his life to the *Eccleston* estate. The respondents contend, first, that considering the length of time which has elapsed since the order complained of was made, this Court cannot, or, at all events, in the exercise of its discretion will not interfere ; and, secondly, that the order complained of is not open to objection.

On the first point we are of opinion that the petitioner is not barred by lapse of time, and that there is nothing to warrant the Court in refusing to entertain the appeal on that ground.

It was pressed in argument by the respondents, that the present proceeding is to be regarded rather as a rehearing than an appeal, as something therefore which the petitioner is not entitled to *ex debito justitiæ*, but which he can only obtain as an indulgence to be conceded or withheld at the pleasure of this Court. There is,

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Mr. *Turner* and Mr. *Prior* for the appellant :—

The Vice Chancellor of the County Palatine, by his order of *January 1823*, put the true construction on the

undoubtedly, some obscurity as to the precise nature of the equitable jurisdiction exercised by the Duchy Court in reviewing the decrees of the Vice Chancellors of the County Palatine. In *Addison v. Hindmarsh*,<sup>a</sup> it is said in a note, that an appeal lies, by act of Parliament, from the Equity Court at *Lancaster* to the Duchy Court. The act there referred to, is probably the act of 1 Edw. IV., printed in the appendix to *Ruffhead's Statutes*, and cited in the case of the Duchy, reported in *Plowden*, p. 218. (He stated the act.) It is not easy to say from the statute whether, when the Chancellor of the Duchy reverses or varies the decrees of the Vice Chancellor of the County Palatine, he does so in exercise of a jurisdiction strictly appellate, or merely as rehearing that which has been already heard by another judge of the same court. In *Ormerod v. Hardman*,<sup>b</sup> it appears, that that case which had been heard and reheard by the Vice Chancellor of the County Palatine was again heard by the Chancellor of the Duchy. This would have conclusively shown the jurisdiction of the Duchy Court to be in the strictest sense appellate, if the doubt suggested by Lord *Eldon*, in *Brown v. Higgs*,<sup>c</sup> as to the power of the Lord Chancellor to rehear a cause which had been heard and reheard at the Rolls was well founded; but it is clear that such is not the case, as appears from the course pursued by Lord *Eldon*, not only in the case of *Brown v. Higgs*, but also in the subsequent case of *Blackburn v. Jepson*,<sup>d</sup> so that nothing can be deduced from the report of *Ormerod v. Hardman*, which will throw light on the present question. It appears, however, that when a decree of the Vice Chancellor of the County Palatine is brought before the Duchy Court, the whole record is remitted. This is a circumstance strongly indicative of a jurisdiction strictly appellate; and on the whole, we incline to the opinion that such is the true nature of the functions of the Chancellor of the Duchy, when reviewing the decrees or orders of the Vice Chancellor. The question, however, is not free from doubt; and if the decision of

<sup>a</sup> 1 Vern. 443.

<sup>b</sup> 5 Ves. 725.

<sup>c</sup> 8 Ves. 562, 566.

<sup>d</sup> 2 V. & B. 359.

words "younger son" in this shifting clause; and after so long an acquiescence of all parties in that order, the Chancellor of the Duchy Court—assuming that he had

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this point was important in the present case, we might have desired further information before we gave our judgment. Whether the proceeding be strictly an appeal, or merely a re-hearing, we think, in either case, the petitioner is entitled to have his case heard, and to have the judgment of this Court on the merits.

It remains now to consider the question on its merits; that is, whether the Vice Chancellor was right in his construction of the *Eccleston* shifting clause. That estate is, by the will, given to *Charles*, for his life, and afterwards to his issue; and the declaration of the Vice Chancellor, in the order of 1823, is founded on the assumption that the effect of the shifting clause was to carry the estate away from *Charles* to *Thomas*. By that clause, the testator directed that if, by virtue of the settlement which was to be made pursuant to the trusts of his will, his son *Charles* should become entitled to the possession of the *Wrightington* estate, and any younger son of the testator's body should then be living, then the uses and trusts of the *Eccleston* estate, in favour of *Charles* and his issue, should cease. Two events were thus to concur in order to make the interest of *Charles* and his issue in the *Eccleston* estate cease; namely, first, he was to become possessed of the *Wrightington* estate, and secondly, at the time of his so becoming possessed, there was to be in *esse* a younger son of the testator, or the issue of such younger son.

The first of these events happened at the testator's death; for *William*, the second son, having died without issue, in the testator's lifetime, *Charles*, on the death of his father, became entitled at once to the *Wrightington* estate. The question is, whether the second event also happened, that is, whether there was, in *esse*, at the death of the testator, any son of the testator "younger" than *Charles*, according to the true meaning of the word *younger*, as used in the *Eccleston* shifting clause. If there was, then the order of the Vice Chancellor is right; if there was not, it is wrong.

Now there certainly was no younger son in *esse*, taking "younger" in its ordinary acceptation; for the testator left only two sons, *Thomas* and *Charles*. But the respondents contend

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appellate jurisdiction, ought not to have reversed it, or at all adjudicated on the respondent's petition. The question, however, in this appeal is confined to the mean-

that, although there was no younger son properly so called, yet that *Thomas*, though an eldest son in point of age, was, as to the *Eccleston* estate, subsequent in limitation to *Charles*, and so a younger son within the meaning of the shifting clause. This was the construction put on the will by the Vice Chancellor; but after giving the subject our most anxious attention, we feel bound to say that we cannot concur in that construction. The safe rule of construction in general is, to interpret the words of wills, as well as of deeds, according to their plain natural import, unless by so doing some manifest absurdity or inconvenience would follow, which is sufficient to satisfy the judge that the person using the words must have used them in some sense different from what would be their ordinary meaning. It does not appear to us that any such absurdity or inconvenience will result from holding, that the testator used the word "younger" in this case in its ordinary sense. He had three estates and three sons. He gave the *Scarisbrick*, the principal estate, to *Thomas*, his eldest son, and his issue; he gave the *Wrightington*, the estate second in point of value, to *William*, his second son, and his issue; and the *Eccleston*, which was the smallest estate, to *Charles*, his third son, and his issue; and he certainly contemplated the possibility of his having other sons to be afterwards born. The great object of the testator was to found three families in the persons of three sons, and to secure one estate to each family; and the will, both in the limitations of the estates and in the shifting clauses, was evidently framed with a view to that leading object. Construing the word "younger" in the *Eccleston* shifting clause to mean younger in point of age, according to its natural import, that clause is still quite sufficient to carry out the testator's leading intention of founding three families, so long as any three sons, or the issue male of any three sons, should be in existence. By the death of *William* without issue, and the death of the testator, without having any after-born son, the leading intention, that of founding three families in the persons of three sons, was defeated. It became impossible to found more than two families; and the limitations, with the *Wrightington* shifting clause, were quite well adapted for that purpose, securing the *Scarisbrick* estate to

ing that is to be put on those words. It is to be observed that the devise of the estates is executory, but even if the testator had actually devised the *Eccleston* estate, which

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the principal branch, and the *Wrightington* estate to the other, now become the second branch. What then is to become of the third estate, originally destined to support a distinct line, the carrying out of which original destination has become impossible? Is it to remain with the youngest son, to whom it was originally given? or is it to go over to the eldest son? There can be no doubt but that, construing the words of the will literally, it would remain (according to the original gift) with the younger son; and we see no reason to justify us in saying that such construction could not have been the testator's meaning. He evidently considered the *Eccleston* estate as being a subject of very inferior importance when compared with his other estates. He might think the son who was to take the *Scarisbrick* estate was already so amply provided for, as to render any shifting clause in his favour altogether unnecessary; and in such case the word "younger" may have been used intentionally, with the very object of excluding the claim on the part of *Thomas*, now insisted on by the respondents; or, which is the more probable supposition, the case which has occurred may not have presented itself to the mind of the testator, or of those who framed the will. In either of those cases it would be manifestly unjust to construe the language of the testator in any other than its natural sense; in the former case, because such a course would actually defeat the intention, though expressed in unambiguous language; and in the latter, because the Court would be altering the plain meaning of the words, in order to fix on the testator a meaning which, according to the hypothesis, he never entertained.

It is, however, said, that there are circumstances on the face of this will indicating a probable intention, that in the events which happened, *Thomas*, and not *Charles*, should take the *Eccleston* estate. If, it is said, the value of that estate had been less than 15,000*l.*, then, as the testator in fact left only two sons surviving him, it would have gone to *Thomas*, the eldest son, and not to *Charles*. This is undoubtedly true; that is a case which did present itself to the mind of the testator, and for which he has made express provision. In such a state of things *Thomas* would have taken, not by any forced interpretation of the word

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alone is here in question, to the uses upon which he directed the conveyance of it to be made; that is, if the trusts of the will had been executed, and not executory;

“younger,” but by a plain gift in his favour, on the construction of which no doubt could have arisen. On the other hand, if all the three sons had survived the testator, and the *Eccleston* estate had been under the value of 15,000*l.*, *Charles* would have taken it absolutely; and on the death of *William*, without issue, would have taken the *Wrightington* estate, when there would clearly have been no shifting clause as to the *Eccleston* estate; so that *Charles* would have kept both. Very little reliance, therefore, as to intention, can be placed on this gift of the *Eccleston* estate, in case it had turned out to be below the value of 15,000*l.* In such case, if *William* died the day before the testator, *Thomas* would take it; if he died the day after, then *Charles* would take it. The argument of the respondents is, that the testator probably meant, that if he left only two sons, the *Eccleston* estate, if above the value of 15,000*l.*, and therefore the subject of settlement, should go to *Thomas*, because if it had been under that value, and therefore not the subject of settlement, it would clearly have gone to him; and in order to carry this intention into effect, it is proposed to do violence to the ordinary meaning of the word “younger” in the shifting clause, by construing it to mean posterior in limitation. The answer is, that by similar reasoning it must be presumed that the testator meant, in case he left three sons, and the second son should die without issue immediately after him, that the youngest son should take the *Eccleston* estate, if above the value of 15,000*l.*, because he would, in such case, certainly have taken it if it had been under that value. And yet this intention would be entirely defeated by the proposed forced interpretation of the word “younger,” and would be perfectly carried out by giving to that word its plain ordinary meaning.

Then it is said, that the testator, after the death of *William*, made a codicil, whereby he increased the amount of provision for his wife and daughters, and thus cast an additional burthen on the estate of *Thomas*; and it is suggested that he must have done this on the supposition that the property given to *Thomas* would be augmented by the *Eccleston* estate coming to him in consequence of the death of *William*; and this is supposed to furnish an argument that he must have intended to use the word

still it is submitted that the word "younger," in the *Eccleston* shifting clause, must be construed as meaning "younger or posterior in order of limitation," and not

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"younger," in the *Eccleston* shifting clause, in such a sense as should carry that estate to *Thomas*. All we can say to this suggestion is, that it may be true, but it is mere conjecture. The additional provision for his wife and daughter is just as consistent with the supposition that he thought the former provision inadequate with reference to the then value of the *Scarisbrick* estate, as that he supposed *Thomas* would take the *Eccleston*. And further, it is to be observed that the testator certainly looked to the probability of *Eccleston* being of a value under 15,000*l.*, in which case *Thomas* would have taken it in addition to *Scarisbrick*. At all events, as the testator is entirely silent as to the motive for the additional gift, it is impossible for any court to fix on a particular state of circumstances as to what must be supposed to have influenced him, and then to put a forced construction on plain words, in order to make that state of circumstances exist.

It is contended in support of the order of the Vice Chancellor, that in construing the word "younger" to mean "posterior in limitation," little or no violence is offered to its ordinary interpretation. "Younger," it is said, does not necessarily mean "younger in point of age." It is suggested that a person is said to be a "young member of Parliament," "young at the bar," "young in office," and the like. No doubt that is so. The word is, in such cases, used metaphorically, whereas, in speaking of children, the word, unless controlled by the context or by circumstances, is plainly used in its direct, and not in any figurative, sense. We say unless controlled by the context or by circumstances, because there are, undoubtedly, many cases in the books in which the courts have felt themselves warranted in saying that the word "younger" must receive a construction large enough to include children not strictly younger, but standing in the same situation as younger children properly so called; and the respondents rely much on those cases as authorities for the construction adopted by the Vice Chancellor in the order now appealed from. We have consulted all those cases, but we cannot think they bear out the proposition of the respondents. (He then stated the grounds of the decisions in the cases which were cited in the ar-



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"younger in order of birth." And therefore, after the *Wrightington* estate devolved on *Charles* by reason of the death of *William* without issue, the *Eccleston* estate

gument; *Beale v. Beale*,<sup>a</sup> *Butler v. Duncombe*,<sup>b</sup> *Teynham v. Webb*,<sup>c</sup> *Mead v. Cave*,<sup>d</sup> *Bretton v. Bretton*,<sup>e</sup> *Chadwick v. Doleman*,<sup>f</sup> *Duke v. Doidge*,<sup>g</sup> *Heneage v. Hunloke*.<sup>h</sup>)

All these cases proceeded on the intelligible principle, that from the nature of the deed or will under which the question arose, it must have been the meaning of the parties to provide for all the children, and in order to carry out this intention, it was necessary to understand by the words "younger children," all the children other than an eldest or only son: in other words, all the children except the *hæres natus* or *hæres factus*. The Court has felt itself warranted in thus putting on the words a construction not strictly according to their literal meaning, in the same way as it does with the words "heirs of the body" in marriage articles. In both cases, the nature of the provision intended clearly shows that the words must have been used in a sense different from that which they ordinarily had been; and the Court therefore construes them in the sense in which, from the nature of the instrument, they must have been understood by the parties. What analogy then do these cases furnish towards enabling us to construe the word "younger" in the will now before us? What is there in the very nature of the provisions of this will showing that the testator must have used the word "younger" not in its obvious sense? When the intention of founding three distinct families in the persons of three sons became impossible, by the death of one son without issue, there is no more incongruity with the presumable intention of the testator in uniting the two mesne estates in the person of the younger son, than in giving one of them to the elder. The only guide as to intention in such case must be found in the language of the will itself, and there does not appear to us to be any thing in that language to give to the word "younger" any other than its ordi-

<sup>a</sup> 1 P. Wms. 244.

<sup>b</sup> *Id.* 448.

<sup>c</sup> 2 Ves., sen. 210.

<sup>d</sup> 1 Rep. in Chan. 224.

<sup>e</sup> 3 Chan. Rep. 1.

<sup>f</sup> 2 Vern. 528.

<sup>g</sup> 2 Ves., sen. 203 n.

<sup>h</sup> 2 Atk. 456.

shifted from *Charles* to *Thomas*, who, as to that estate, was then a "younger" son than *Charles* in order of limitation, there being then no son living, or issue of a son younger in the order of birth.

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nary meaning. [He then stated the case of *Hull v. Luckup*,<sup>1</sup> also referred to in the argument, and shewed that it had no application to the present case.]

It was pressed at the bar that this is a case of an executory trust, and not a trust executed; and therefore it was said the Court will direct a conveyance so as to obviate any omissions or errors on the part of the testator, so as to effectuate the real intention. Undoubtedly it will. But the question still arises, what is the intention? How is that intention to be ascertained? It can only be obtained by looking to the language used, and if we are right in our opinion, that there is nothing to show that the testator meant to use the word "younger" in any other than its ordinary sense, it matters not whether the trust is executed or executory. In either case the ordinary sense must be adhered to.

On the whole, therefore, there does not appear to us, either in the nature of the provisions or the presumable intention of the testator, or in the context of the will, any thing which can justify us in saying that the word "younger," in the *Eccleston* shifting clause, means any thing else than younger in point of age. It follows that so much of the order of the Vice Chancellor of the County Palatine as declares that, on the death of the testator, *Thomas*, his eldest son, became entitled to the *Eccleston* estate, was erroneous, and that it must be varied by declaring that *Charles*, on the death of his father, became entitled to that estate for his life. We have come to this conclusion on a full consideration of the case, and without resting on what was said by the late Mr. Justice *Park*, in delivering the opinion of the Judges in the House of Lords, in the case of *Scarisbrick v. Eccleston*.<sup>2</sup> We agree with the observation, that what was there said as to the present case was extra-judicial, and not necessary with reference to the question then to be decided. At the same time it is satisfactory to us to know that, in reversing an order which has been so long acquiesced in, we have the high sanction of those who concurred in the opinion delivered by Mr. Justice *Park*.

<sup>1</sup> 4 Sim. 5.

<sup>2</sup> 5 Clark & Fin. 450-1-2.

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This question was not involved in the decision of the House on the former appeal, which was brought by the present respondent. That decision proceeded on the ground that both the *Eccleston* and *Wrightington* shifting clauses were to be read distributively as to sons and daughters, and that they did not cause either of the estates to shift to a daughter of the testator, as long as any son, or the issue of any son, was living. The respondent was the only son then living, and there was no issue of any other son. The question which had arisen and been decided in the affirmative by the Vice Chancellor of the Court of the County Palatine in 1823, was, whether, under the shifting clause of the *Eccleston* estate, that estate would shift in the event of there being living a son, as there then was, or issue of a son, elder in birth, but posterior in limitation, to the respondent, the son on whom the *Wrightington* estate had devolved. That question is now, for the first time, before this House. The Vice Chancellor decided that the word "younger," in the *Eccleston* shifting clause, meant "younger in order of limitation." The decision of the Chancellor of the Duchy Court, reversing the Vice Chancellor's order, rests on the assumption that the words "elder" and "younger" are to be taken in their natural and ordinary signification, and mean elder and younger in order of birth, and that, although they may receive another construction if the context of the instrument required it, there was nothing in the context of this will to warrant such other construction.

The words "elder" and "younger," applied to individuals, merely as living beings, without reference to property, office, title, or other like distinction, must, of course, be taken to refer to the order of their births; but the parties to whom they are applied may be placed in situations, and under conditions regardless of their ages, rendering the words capable of other distinctions; and then the question would be whether, from the context in which the

words are used, they are to be referred to the differences in the natural, or in the social or adventitious age of the parties to whom they are applied. There are many familiar instances in which the natural and ordinary meaning of the words is excluded when they are applied to persons with relation to their office or situation, as when it is said, one member of the bar is senior or junior to another, a junior bencher of one of the inns of Court, a junior peer of this House: So, also, in the construction of instruments providing portions for children, excluding the one to whom the family estate is limited, the words "elder" and "younger" have acquired a technical meaning, referable to the order of limitation of the principal estate, distinct from the order of birth.

There are several passages in this will which shew that the testator used the word "younger," in the *Eccleston* shifting clause, in the sense of "younger in the order of limitation." In the limitations of the *Wrightington* and *Eccleston* estates to the sons of the testator's sons in tail general, it is evident, from the context, that the words "eldest" and "younger" are to be construed in reference to the order of limitation, and not of birth. On examination of the will, it appears clear that, although it was a great object with the testator to found three distinct families, his desire in that respect was subordinate to a preference of males over females; and so his daughters do not take any of the estates until the sons and the whole of their issue are extinct; and the male issue of the son, last in order of succession to the estates, take before the female issue of the son first in the order of succession. In the events which happened, of the *Wrightington* estate having devolved on *Charles* by the death of *William*, without issue, *Thomas* still living, the shifting of the *Eccleston* estate from *Charles*, and its devolution to *Thomas* would, as the appellant contends, depend, not on events in any way connected with *Thomas* or *Charles*, or

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either of their families, but on the state of the family of any after born son of the testator. The decision of the Chancellor of the Duchy Court was, that there having been no subsequently born son of the testator, the *Eccleston* estate did not go over to *Thomas*, but remained in *Charles*, notwithstanding the *Wrightington* estate had devolved upon him; but the argument in support of that decision, admits that, if there had been a subsequently born son of the testator, who had died leaving only female issue, the *Eccleston* estate would have been divested from *Charles* and gone to *Thomas*, and it is plain that the same result must have followed, if there had been an after born son living at the time of the devolution to *Charles* of the *Wrightington* estate, and such after born son had afterwards died leaving female issue, which shews how capricious and inconsistent is the construction put on the word "younger" by the respondent, while, by the appellant's construction of it the limitations of the *Eccleston* estate are in all cases consistent.

There was in the will an absolute gift to *Thomas* of the *Eccleston* estate, if, after satisfaction of certain charges, it proved to be of less value than 15,000*l.*, and there should be then living but two of the testator's sons, but if of the value of 15,000*l.*, it was to be the subject of a settlement. It is manifest on the face of the will that the testator intended to provide better for his eldest than for any other son. Yet the contrary would be the result of the respondent's construction; for the *Eccleston* estate, if not worth 15,000*l.*, would go to the eldest son, absolutely, with the *Scarisbrick*; but if of greater value, as happened, it would remain with the youngest son, in addition to the *Wrightington* estate, both which were of far greater value than the *Scarisbrick* estate, the only property that would, in that case, belong to the eldest son, diminished by the increased charges put on it by the second codicil made upon *William's* death.

If *Charles* had died instead of *William*, it is quite clear that *Thomas* would have both the *Eccleston* and *Scarisbrick* estates, and *William* the *Wrightington* only ; it is, therefore, imputing a very capricious intention to the testator to suppose that if his two surviving children should be the first and second, the first should have the two estates, and the second the one only, whilst if the two children who survived him should be the eldest and the third or a subsequently born son, the eldest should have but the one estate, and the youngest the two.

The provisions of the second codicil, made after the death of *William*, are inexplicable, unless on the construction contended for by the appellant, that the death of *William* gave the *Eccleston* estate to *Thomas*. By that codicil, the testator referred to the death of *William*, and in consequence of that event, charged the *Scarisbrick* estate, with additional annuities, to his wife and daughters. But why should he, on that occasion, select the *Scarisbrick* estate to bear those charges, unless it was that by that circumstance the owner of the *Scarisbrick* estate acquired a large portion of his property, as, according to the appellant's construction he would do ? But if, according to the respondent's construction, the death of *William* proved only an accession of fortune to *Charles*, surely the testator would have charged these additional annuities on one of the estates given to *Charles*.

It is to be observed that the testator in several parts of the will describes a younger son in order of birth, by the words "subsequently born son," and in other parts, as in the *Wrightington* shifting clause, he actually says his eldest son shall be a younger son in order of limitation, thereby putting his own meaning on the words, and leaving no doubt of his intention, which it is the duty of the House to carry into execution. The House, looking to the whole context, cannot fail to see the meaning of the testator.

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The *Lord Chancellor* observed that the case had been very ably argued ; yet, as the learned judges present entertained no doubt, nor did he himself, on the point in question, it was not necessary to hear the other side. His Lordship then put a question of law to the judges, which they obtained time to answer.

1847. Lord Chief Justice *Wilde* delivered the opinion of him-  
 June 24. self and the other judges :—

'The answer to your Lordship's question depends upon the construction of the shifting clause relating to the *Eccleston* estate in Mr. *Eccleston's* will.

The language of the clause is not ambiguous, but is such as is in ordinary use, and bears a well known meaning. But it is contended, that upon reference to the other parts of the will an intention may be inferred on the part of the testator, which will not be fully carried into effect by reading the clause in question in the ordinary sense attached to the language. Such imputed intentions are in most respects speculative and uncertain, and where any are to be found which the construction of the clause in question, according to its ordinary meaning, will not carry into effect, or may defeat, it is more probable that such failure will arise from the testator not having contemplated or provided for the very many events which may be supposed as possible to arise in the family, than that he used such expressions in any other than the ordinary meaning. The clause being plain and simple in its language, we do not think the rules of construction, now considered as settled, will warrant the clause receiving a

(g) 3 Myl. & C. 584.

(h) 4 Simons, 5.

construction other than according to its ordinary meaning, without its appearing satisfactorily from other parts of the will that the language was used by the testator in some other sense.

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The judges having heard the arguments, and having perused the judgment given in the court below (i), in which the judges entirely concur, are unanimously of opinion that none of the passages in the will referred to, nor any of the arguments which have been urged, warrants a construction of the clause in question, other than that which the language of it in the ordinary meaning should receive; and, therefore, we are of opinion that, on the death of the testator, his son *Charles* became entitled to the *Eccleston* estate.

*Lord Brougham*.—I entirely agree in the opinion that has been come to by the learned judges who acted as assessors to the Chancellor in the Court below, and with the learned judges who have pronounced their opinion to day. I do not mean to deny that the words “younger son” might not, according to the context, be capable of a different meaning from what they ordinarily bear. I do not mean to deny that if any gross absurdity, any glaring inconsistency with the manifest intention of the party making the instrument, would arise from taking the words in their ordinary meaning, you might not by implication be entitled to take the unusual and extraordinary meaning of those words rather than the ordinary meaning. But those circumstances do not exist in the present case, neither in the context, nor as matter of inference, is there anything that entitles us to depart from the ordinary meaning of the words “younger son.”

*The Lord Chancellor*.—I have merely to express that

(i) *Vide ante* p. 175, *et seq.* (note).



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my opinion is in accordance with the opinion of the learned judges. There is only one point to which I wish to allude, which was raised by Mr. *Turner*. Looking at the original decree of the Vice Chancellor of the Duchy, I find that there is no adjudication on the subject of the rents. There was merely an inquiry as to the receipt of the rents. That decree was the subject matter of appeal to the Chancellor of the Duchy, and is now before this House. There is nothing upon the subject of arrears of rent before us, which in the proceedings are under consideration; nothing is done with regard to rents that is not consistent with the judgment now pronounced by this House; that is, that the decree of the Court below be affirmed.

Mr. *Tinney* (*k*).—I trust, after this long litigation, your Lordships will give us the costs of the appeal.

The *Lord Chancellor*.—I think you are entitled to the costs: their Lordships' opinion is, that the decree of the Court below be affirmed, with costs.

The judgment was then affirmed, with costs.

(*k*) Mr. *Tinney* and Mr. *Charles Hall* were counsel for the respondents.

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|-------------------------------------|---|---|---|---------------------|------------------------|
| <b>ROBERT ALLEN</b>                 | - | - | - | <i>Appellant.</i>   | 1845.<br>March 17, 18. |
| <b>RICHARD M'PHERSON and others</b> | - |   |   | <i>Respondents.</i> | 1847.<br>April 7, 14.  |

A testator by his will and codicils gave R. A. large bequests, which he revoked by a final codicil, providing only a small weekly allowance for him during his life. The will and all the codicils having been admitted to probate, after litigation as to the last codicil in the Ecclesiastical Court, R. A. filed a bill in Chancery alleging that the testator had executed the last codicil under undue influence of the residuary legatee, and false representations made at her instance respecting R. A.'s character; and that he had not been permitted in the Ecclesiastical Court to take any objections to that codicil, except such as affected the validity of the whole instrument: the bill therefore prayed that the executors or residuary legatee might be declared trustees or trustee for R. A. to the amount of the revoked bequests.

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risdiction.*

Held, on demurrer, that the Court of Chancery had no jurisdiction in the matter (*dissentientibus*, Lord *Cottenham* (Chancellor) and Lord *Langdale* (M. R.)), and that the proper course would have been an appeal to the Judicial Committee of the Privy Council against the sentence of the Ecclesiastical Court.



JOHN ALLEN, a native of *East Chinnoek*, in the county of *Somerset*, came at an early age to *London*, and there acquired a large fortune in trade, from which he retired in 1820. He made his will in 1834, and thereby, after appointing *Richard M'Pherson* and *Samuel Tomkins* his executors, and providing for his daughter, his only legitimate child, then wife of *George Evans*, he gave, among other bequests to his relations at *East Chinnoek*, the sum of 4000*l.* to the appellant and his sister and brother, children of his deceased nephew, in equal shares, to be

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paid to them as by the will directed. He gave the residue of his estate to his executors, in trust for his daughter. He afterwards made nine codicils; by the fourth of which, dated *November* 1836, he gave additional bequests of 2000*l.* each to the appellant and his brother, and 3000*l.* to their sister, to take effect only in case *Mrs. Evans* died in her husband's lifetime. By the sixth codicil, dated *March*, 1837, he gave the fourth part of the clear residue of his estate to the appellant. By the seventh he appointed *William Allen* (who was his son born before marriage) an executor of his will, jointly with the two before named. By the ninth codicil he revoked the bequests given by the will and former codicils to the appellant and the other relatives at *East Chinnock*, and in lieu of them substituted smaller bequests. The substituted bequest to the appellant was a direction to the executors to purchase 800*l.* in consols in the names of trustees, in trust to receive the dividends, and pay the same to the appellant by weekly instalments during his life; the capital, on his decease or attempt to sell or encumber it, to fall into the residuary estate.

The testator died in *November*, 1837, and probate of the will and nine codicils was granted by the Prerogative Court to the executors after an attempt made by the appellant to prevent the probate as to the ninth codicil.

The appellant filed his bill in Chancery in 1841 against the executors and *Mrs. Evans* and her husband, stating the will and codicils, and praying that it might be declared that the appellant was entitled to the bequests given or intended for him by the will and first eight codicils, notwithstanding the revocation of them by the ninth codicil; and that the executors or *Mrs. Evans* were trustees or trustee for him to the extent of such bequests.

The case stated in the bill to sustain that prayer was, in substance (a), that the testator was, after the date of the

(a) The allegations in the bill are set forth in 1 Phil. 133.

sixth codicil, feeble in mind and in body from age, and his previous habits of drinking wine and spirits; that Mrs. *Evans*, then residing with him, exercised great influence over him, and under that influence he executed the subsequent codicils; that she and *William Allen*, before mentioned, upon obtaining a knowledge of the bequests given to the appellant by the sixth codicil, became jealous of him, and formed a determination to obtain a revocation, or at least a great diminution, of them, and with that view they contrived that *William Allen* should go to *East Chinnoek*, with the testator's sanction, to inquire into the character and conduct of the appellant and his brother; that *William Allen*, upon a secret agreement with Mrs. *Evans*, concocted a report containing various false representations of the appellant's character and manner of life, in order to prejudice the testator against him; that such pretended report was read to the testator, who did not seem to understand the contents, and was then, without any express directions from him, taken by *William Allen* to Mrs. *Evans*'s solicitor, who, from the suggestions therein contained, and from verbal instructions given him by *W. Allen*, prepared the ninth codicil, and the same was executed the same day by the testator—relying on the truth of the pretended report—without any draft being previously submitted for his perusal; the object of such haste being for fear the testator should on reflection think proper to inquire into the truth of the statements made in the said report, and so frustrate the scheme of *William Allen* and Mrs. *Evans*; that probate of the will, with the nine codicils, was granted by the Prerogative Court to the executors; that an attempt was made by the appellant to prevent such probate being granted as to the ninth codicil, on the grounds that the testator was of unsound mind at the time of executing it, and that undue influence was exercised over him by *W. Allen* and Mrs. *Evans*, but that he was confined by the said Court

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to grounds of objection, which affected the said codicil as an entire instrument, and was not permitted to go into the case stated in the bill, or into any other case solely relating to the parts of the codicil which affected only himself.

The executors demurred to the bill for want of equity and of parties. The demurrer was overruled by the Master of the Rolls, but on appeal to the Lord Chancellor the demurrer was allowed for want of equity, by an order (*b*) dated the 11th November, 1842, against which the appellant brought this appeal.

Mr. Kindersley and Mr. Jolliffe for the appellant :

The bill shews a clear case of fraud on the appellant and imposition on the testator, committed by *William Allen* in conjunction with Mrs. *Evans*, who will take the benefit of the fraud either as residuary legatee under the will, or as sole next of kin of the testator, according to the Statute of Distributions. The question then is, whether a Court of Equity has not jurisdiction to relieve the appellant from the consequences of such fraud, notwithstanding the sentence of the Ecclesiastical Court establishing the whole will. Unless the court has and exercises such jurisdiction, the appellant was, before grant of probate, as well as after it, without remedy, inasmuch as the case of misrepresentation and fraud made by his bill could not be set up in the Ecclesiastical Court against the validity of the ninth codicil or any distinct part of it, because the codicil must be taken to be a part of the will, and made by the testator *animo testandi*. It must be admitted that he had the mind and intention to revoke the previous bequests, while he was not aware that the representations made to him respecting the appellant were false. But those representations being now admitted by demurrer to the bill to be false and fraudulent, and to have been made at the instance of the person who

(*b*) 1 Phillips, 142.

would have all the benefit of their intended effect, it is contrary to equity and justice to allow the appellant to be deprived of bequests which he would receive if the codicil resulting from such representations had not been executed.

There is a great variety of cases on this subject, most of which were referred to in the arguments in the Courts below. *Marriot v. Marriot*, reported by *Strange* (c), and also by Chief Baron *Gilbert* (d), whose judgment it was, goes to the full extent of the appellant's prayer. There the testator gave the residue of his personal estate to his wife, and made her his executrix; his sons filed their bill in the Exchequer, insisting that the gift of the residue was obtained by fraud and surprise; the wife's counsel contended that the probate of the will, which was granted to the wife, was conclusive, and that a Court of Equity had no jurisdiction touching the disposition of the residue, but that it was matter for determination in the Ecclesiastical Court; but the Chief Baron, in his elaborate judgment, says (e) "Courts of Equity can hold plea concerning a legacy, and likewise concerning the devise of the *residuum*; they may in notorious cases declare a legatee that has obtained a legacy by fraud to be a trustee for another." Then, after instancing some cases, he proceeds, "But in all such cases, Courts of Equity must consider what is the real will of the testator, and they cannot declare a trust according to their own fancy, nor according to what the testator should have willed, for then they make the will, and not the testator. But they may, to answer the real intention of the testator, declare a trust upon such will, though it be not contained in the will itself, which is in three cases: first, in that of fraud upon a legatary (legatee) before mentioned." After stating the other two cases, he adds, "And nobody has thought, that declaring a trust in any of those cases is an

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(c) 1 Str. 666. (d) Gilb. Cas. in Chan. 203. (e) 1 Str. 673.

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infringement of the ecclesiastical jurisdiction." The Lord Chancellor in his judgment in the present case expressed his concurrence in the three positions so laid down by Chief Baron *Gilbert*, adding, that in none of such instances would the Ecclesiastical Court be competent to afford relief; but he thought they were distinguishable from the case before him (*e*).

[The *Lord Chancellor*.—It was assumed in the argument before me, that the Ecclesiastical Court had jurisdiction in the case, and I took it to be so, but if it had not, then certainly my decision must be wrong.]

It must be admitted that, in executing the last codicil, as well as all the others, the testator had the *animus sic testandi*, and therefore the Ecclesiastical Court could not do otherwise than admit them all to probate; but it could not do what the appellant asks the Court of Equity to do, declare the residuary legatee a trustee for him, upon the ground that the *animus testandi*, the disposing mind, which certainly existed, was produced by fraud. In all cases in which Courts of Equity refused to interfere, the question was whether it was the testator's will. That question does not exist here, for it is admitted that it is the will of the testator, made according to his then existing intention; but that intention was the result of fraudulent representations, into which the Ecclesiastical Court refused to enter, on the ground that it could not hear complaints of one legacy only, others given by the same codicil not being complained of; but a Court of Equity may even after probate inquire into the fairness of the case, whether of fraud or mistake; *Marriot v. Marriot* (*f*), *Campbell v. French* (*g*), *Kennell v. Abbott* (*h*). The frauds of which the Ecclesiastical Court takes cognizance must be connected with the actual making of the will—with the mere manufacture of it; and sometimes it will reform a will where there is an ambiguity, and it sees

(*e*) 1 Phillips, 144–5.

(*g*) 3 Ves. 321.

(*f*) 1 Strange, 666.

(*h*) 4 Ves. 802.

cause for it, as in *Harrison v. Stone* (i), *Shadbolt v. Waugh* (k); but will not strike out a clause in a will giving bequests to a class, for fraud upon one only of that class. That is the case here; there is no ambiguity, and the fraud complained of was not in the execution of the instrument, but in the residuary legatee's previously raising the testamentary disposition in favour of herself to the prejudice of another. What Lord *Alvanley* says in *Kennell v. Abbott* is quite in point. The testatrix there gave a legacy to a man whom she supposed to be her husband, but he was the husband of another. "I am called upon," says Lord *Alvanley*, "to determine whether the law of England will permit this legacy to be claimed by him. Under these circumstances, I am warranted to determine that whenever a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be supposed to be the motive of the bounty, the law will not permit him to avail himself of it." That is the principle, for the application of which the appellant contends: it is the same principle that was applied by Sir *A. Hart* in *Segrave v. Kirwan* (l), a case not of fraud but of accident and ignorance, and by Lord *Eldon* in *Bulkley v. Wilford* (m), a case, if not of fraud, of culpable professional ignorance. There is no case or authority whatsoever warranting the argument that the jurisdiction over the fraud in this case belonged to the Ecclesiastical Court and not to the Court of Equity. The cases that were cited in the Court below, and which may be cited here in support of that position. *Archer v. Mosse* (n), *Plume v. Beule* (o), *Steventon v. Gardiner* (p), *Kerrich v. Bransby* (q), *Barnesly v. Powel* (r), *Ex parte Fearon* (s), and *Gingell v. Horne* (t), do not sustain it.

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(i) 2 Hagg. 549.

(k) 3 Hagg. 573.

(l) 1 Beatty, 157.

(m) 2 Clark & Fin. 102.

(n) 2 Vern. 8.

(o) 1 P. Wms. 388.

(p) 2 P. Wms. 286.

(q) 7 Bro. P. C. 437.

(r) 1 Ves., sen. 284.

(s) 5 Ves. 633.

(t) 9 Sim. 539.



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Mr. *Turner* and Mr. *Russell* (with whom was Mr. *G. M. Giffard*) for the respondents :

The appellant's bill is of first impression. Such cases of fraud and undue influence as he complains of must have often occurred, and if relief had been ever given against them in equity, there would be some such case in the reports ; in the absence of which it is not unfair to infer that the remedy for them was found in the Ecclesiastical courts ; and so it is said in the text books, as *Glanvill* (u), *Bacon's Abridgment* (v), *Wooddson's Lectures* (w), *Dr. Arthur Brown's Lectures* (x). These writers refer to several cases in which it was held that a Court of equity has no jurisdiction to declare a testamentary instrument relating to personal estate invalid, especially after probate in the proper Ecclesiastical Court ; *James v. Greaves* (y), *Plume v. Beale* (z), *Kerrich v. Bransby* (a).

The case made by the bill is, that the Ecclesiastical Court admitted the ninth codicil to probate, although the appellant opposed it on the grounds that the testator was of unsound mind, and that undue influence and misrepresentation had been used. The proofs of mental incapacity having failed, the other grounds only are now relied on. It is admitted that the testator had a disposing mind at the execution of the codicil, and that he did dispose of his property according to his intention at the time ; but it is alleged that that intention was produced by fraud and misrepresentation. The Ecclesiastical Court has the proper jurisdiction to investigate such a case, and, if proved, to refuse probate. Even if a court of equity had jurisdiction, still it would be contrary to law, and a most dangerous precedent, to inquire into the motives which might have induced a testator to make or revoke a disposition of his property, and to support or set aside such disposi-

(u) Lib. 7, chap. 8.

(v) Vol. 7, tit. Wills, p. 378.

(w) Vol. 3, p. 477.

(x) Vol. 1, bk. ii., chap. 10.

(y) 2 P. Wms. 270.

(z) 1 P. Wms. 388.

(a) 7 Bro. P. C. 437.

tion on the ground of his motives being well or ill founded :—

[The *Lord Chancellor*. You must admit, what is stated in the record, that it was in consequence of the fraud alone the testator made this codicil. By demurring you admit the facts stated.]

Yes, facts that are well pleaded; they were pleaded in the Ecclesiastical Court, and the appellant was allowed to go into evidence of them; the inference therefore is, that the Court exercised its jurisdiction, as it does constantly in such cases; *Castell v. Tagg* (a); *In re Shuttleworth* (b); *Grindall v. Grindall* (c). The interference of a Court of equity would give rise to a conflict of jurisdictions between two Courts acting on the same subject by different ways. There may be cases of fraud,—such as *Kennell v. Abbott*, where a person assumed a false character for the purpose of obtaining a legacy,—in which a Court of Equity would interfere to deprive a party of a legacy obtained by fraud.

The question raised by the bill was, whether upon the facts as stated, the Ecclesiastical Court had jurisdiction to admit or reject the testamentary papers propounded for probate. It is the *animus testandi* that that Court has to consider, and how far deceit or constraint will vitiate the testament. The principle is laid down in *Nicholls v. Nicholls* (d), *Swinburne* (e) and *Godolphin* (f). Circumvention by fraud, deceit, or flattery, have the effect of constraint by force to avoid a will. In this particular case the question is whether the *animus*, which is admitted to have existed, was circumvented by fraud; whether that question be considered on principle or on authorities, the Ecclesiastical Court must be admitted to have jurisdiction to determine the validity of the instrument, to admit or reject part of it, correct mistakes, or supply omissions;

(a) 1 Curtis, 298.

(b) Id. 911.

(c) 4 Hagg. 10.

(d) 2 Phillimore, 180, 185.

(e) Part 1, sec. 3, pla. 32.

(f) Part 3, cap. 25, pla. 7.

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*Fawcet v. Jones* (g), *Micklin v. Franklin*, cited in *Fawcet v. Jones* (h), *Billinghurst v. Vickers* (i), *Wood v. Wood* (j), *Grindall v. Grindall* (k). These cases all show that the Ecclesiastical Court will exercise jurisdiction over wills concocted in fraud. There is no case in which, after probate, a legatee was held, on the ground of fraud in obtaining the will, to be a trustee for a party rejected by the testator. Numerous cases of that sort, in which equity declined to interfere, have been referred to, but no one found in which the Court did interfere. *Kennell v. Abbott*, and *Campbell v. French*, were cases upon construction of the wills. In *Barnesly v. Powel* a distinction was taken between fraud in obtaining a will and fraud in obtaining the probate, which is a circumstance to show that the jurisdiction in equity does not attach to the former; and the principle of the distinction is illustrated by the late case of *Godrich v. Jones* (l), and *Butlin v. Barry* (m).

Mr. *Kindersley* in reply.

The Ecclesiastical Court has jurisdiction to declare what a man's will is, but not its effect—that belongs to the civil courts. The jurisdiction of the Ecclesiastical Court ceases with the grant of probate—the temporal courts then take jurisdiction. The Ecclesiastical Court requires these three ingredients essential to a will: 1st. The testamentary capacity; 2d. The fact of execution of the will; and 3d. The *animus ita* or *sic testandi* (n), and where these are found, the probate must issue. But this does not prevent the Court of Chancery from holding a person who fraudulently takes a legacy under the will to be a trustee for another, who, but for the fraud, would have obtained the legacy. The probate would stand good notwithstanding the interposition of equity. If the *ani-*

(g) 3 Phillimore, 434.

(h) *Id.* 461.

(i) 1 Phillimore, 187.

(j) 1 Phillimore, 357.

(k) 4 Hagg. 10.

(l) 5 Moore's P. C. C.

(m) 1 Curtis, 614.

(n) 2 Blacks. Com. 494.

*mus testandi*, which the Ecclesiastical Court must find to exist, is produced by misrepresentation, that is a species of fraud over which that court has no jurisdiction; finding the *animus* or intention existing, however produced, it must grant probate.

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[The *Lord Chancellor*.—Granted, that Courts of Equity have jurisdiction where the courts of law, or courts spiritual cannot do justice; is this a case in which the Ecclesiastical Court could not do justice? Again, suppose the Spiritual Court has jurisdiction, but the party omits to avail himself of it, has the Court of Equity jurisdiction there also?]

Yes; the *dicta* which have been cited from the text books to shew that the Ecclesiastical Court has the jurisdiction, are quotations from one another, and are founded on cases which do not apply here, as *Andrews v. Powys* (o), *Ex parte Fearon* (p), *Bodmin v. Roberts*; the same case as *James v. Greaves* (q). The other cases that were cited to shew that the Court of Chancery refused to interfere after probate, will be all found, on examination, to be cases in which the question was whether the will was the will of the testator, as *Archer v. Mosse* (r), *Plume v. Beale* (s), *Steventon v. Gardiner* (t), *Kerrich v. Bransby* (u), *Bennett v. Vade* (v), *Gingell v. Horne* (w), *Barnesly v. Powel* (x), *Podmore v. Gunning* (y).

There is no case among those cited from the Ecclesiastical Courts, which shows that they have jurisdiction to refuse probate in a case like this. In *Micklin v. Franklin*, and other cases cited in *Fawcett v. Jones* (z), the codicil was written by mistake on the wrong will; there was no *animus sic testandi*; over mistakes like that,

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| (o) 2 Bro. P. C. 504. | (u) 7 Bro. P. C. 437. |
| • (p) 5 Ves. 633.     | (v) 2 Atk. 324.       |
| (q) 2 P. Wms. 270.    | (w) 9 Sim. 539.       |
| (r) 2 Vern. 8.        | (x) 1 Ves., sen. 284. |
| (s) 1 P. Wms. 388.    | (y) 7 Sim. 644.       |
| (t) 2 P. Wms. 286.    | (z) 3 Phill. 461.     |

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and those that occurred in *Billinghurst v. Vickers* (a), *Nicholls v. Nicholls* (b), *Castell v. Tugg* (c), and *In re Shuttleworth* (d), it is not denied that the Court of Probate has and exercises jurisdiction. *Grindall v. Grindall* (e) was a peculiar case, but it bears on this case only as to the extent of the exception to the jurisdiction of the Ecclesiastical Court. The papers in a case of *Butterfield v. Swen* in 1775 have been procured, but are too voluminous to extract any thing from them, except that it appears that the Court decided against the will propounded, and the case went to the Court of Delegates. Although Sir *J. Nichol* assumed jurisdiction in that case, that is no authority for holding that the jurisdiction in Equity, and of this House also, is ousted in cases of fraud. In the absence of authority either way, the Ecclesiastical Courts will bow to the decision of this House in favour of the jurisdiction in Equity, especially as the Courts Ecclesiastical are not well adapted to deal with questions of fraud.

(At the close of his reply he read, by direction of the House, some of the allegations and extracts from the judgment of Sir *H. Jenner* in this case (f), but he was

(a) 1 Phill. 187.

(b) 2 Phill. 180.

(c) 1 Curtis 298.

(d) *Id.*, 911.

(e) 4 Hagg. 10.

(f) The following are condensed extracts from his judgment, pronounced the 20th of July, 1840.

“The deceased was between seventy-seven and seventy-eight years of age; he left a widow, who was his second wife, and a daughter, Mrs. *Evans*, who resided with him, separate from her husband. It appears that he had, and retained up almost to the day of his death, a strong affection for the members of his family at *East Chincock*, especially for *Robert Allen* (the appellant) and his brother. There was no provision in the will for *William Allen*, the deceased's reputed son; but it appears from the evidence that the 10,000*l.* given to Mrs. *Evans* was a provision for him.

“There is no dispute as to the will and the other codicils; the sole question is, whether the codicil of the 2d of October, 1837, is, or is not entitled to probate. The party opposing the codicil is *R. Allen*; his brother and sister do not appear in the cause,

not able to point out any passage shewing that the appellant was confined, in the Ecclesiastical Court, to objections affecting the ninth codicil as an entire instrument,

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though a decree has gone out against them, and they will be bound by the decision. *R. Allen*, who has thought it his interest to oppose the codicil, has appeared and sued in *forma pauperis*, and has had a proctor and a counsel assigned to him, under whose advice his cause has been ably conducted; and although I differ from the prayer to pronounce against the validity of this codicil, I cannot come to the conclusion that the opposition to this testamentary paper was wholly unauthorized, that there were not circumstances which led the party to oppose this codicil, and in some degree to justify the proceeding adopted in the cause.

"I have already stated that the deceased had expressed a very great regard for his relations in the country; and had shown an intention to benefit them by several testamentary acts before *October* 1837, and it naturally must have been to *R. Allen* a matter of surprise and of strong feeling, after he had been led by deceased to believe, down to the spring of 1837, that he had been provided for by the will, to find that his interest under the will had been reduced to the receipt of the dividends of 800*l.* consols; and I cannot but think that some inquiry into the manner in which this was brought about was perfectly open to the party.

"It seems that *W. Allen*, the reputed son of the deceased, was appointed an executor of the will in *August* 1837, and was not before then named in the testamentary papers. It did appear to the Court somewhat extraordinary that his name should not have appeared in the will, and that no provision should have been made for him; and it was not till on an examination of an answer to an interrogatory put to the solicitor of the testator, the Court found that a sum was set apart for *W. Allen*, the 10,000*l.* which was given to the daughter, on an understanding between her and the deceased that it should be given to *W. Allen*, in order to save the legacy duty of ten per cent., or some other purpose. I mention this circumstance because it was argued that nothing could be more disinterested than the conduct of *W. Allen*, as he has no interest under the will to advance the cause of *Mrs. Evans*, so that he would derive no benefit from the confirmation of the codicil which diminished the interest given to *R. Allen* by the previous testamentary acts of the deceased. But it turns out that he is interested in this sum of 10,000*l.*, his receipt of which is to

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as alleged in his bill. The counsel for the respondents were informed, by the Lord Chancellor, that the House

depend upon the fulfilment of the conditions and understanding between the father and daughter, for she is to have the disposal of this fund for the benefit of *W. Allen*: and when I find that both these parties, according to the evidence, are living together, and keeping up a joint establishment, it does not place *W. Allen* in the position in which he would have stood if he had been totally independent of any interest.

" There appears to have been always a jealousy between *W. Allen* and *Mrs. Evans*, and the *Somersetshire* relations; and this jealousy was naturally inflamed by information as to the contents of the will and codicils, by which so considerable an interest was given to *R. Allen* and to his brother and sister.

" I now come to the part of the case which led immediately to the execution of the codicil. I have stated that the deceased had had contradictory reports relating to his *Somersetshire* relations, and he was annoyed by the letters he received; and in consequence of this annoyance, and of the reports, *W. Allen*, who was at *Tunbridge Wells*, was summoned by the deceased's desire, for it is established by the evidence that it was by the desire and direction of the deceased that he was sent for to come up to *London*: and he then received instructions from the deceased to go into *Somersetshire*, as he represents, for the purpose of making inquiry into the conduct and character of the *Somersetshire* relations, and reporting thereon to the deceased. This must have been the purpose for which he was sent. When I look to the evidence and see that on his return he makes to the deceased a written report of information as the result of his inquiries, unless I suppose the deceased to have been in a state of incapacity, unable to understand the report, I must believe that this was the purpose for which he was sent down, and that in consequence of the information thus given to him, he proceeded to the execution of the codicil before the Court.

" A great deal has been said on the subject of this report. On the one hand, it is said that the report was not the result of inquiry; that there is no evidence to show that there was any inquiry made by *W. Allen*; on the contrary, it is said that by the evidence it appears that before he came to the place he made certain charges against *R. Allen*, which are spoken to by one of

would hear any observations which they would wish to make on the matter just read ; they said that they heard nothing read requiring observation.)

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the witnesses. But it is argued, on the other hand, that there could not be any doubt that the report made to the deceased was the result of inquiries, and amongst other things it is said that the Court would presume so from the *res gesta* ; and although witnesses have not been called from whom *W. Allen* received such information, the Court would presume that the information was the result of inquiry, and *prima facie* that the representation was consistent with the information so obtained. I confess, in a case of this description, I think the Court is not entitled to assume anything. If the party has pleaded the fact that he went down to obtain information, and that on his return he stated to the deceased (as he pleads) the result of his inquiries, I think, in order to entitle him to the benefit of the report, he ought to examine the witnesses from whom he obtained the information, and that the Court is not to infer anything for the benefit of a party who has an opportunity of proving the facts, and does not examine witnesses to sustain them. I think it is no answer to say that the other party, knowing what the facts were, and the persons from whom the information was obtained, ought to have examined witnesses if he intended to dispute the veracity or correctness of the information. I apprehend that the party who pleads it, is the party who is to prove it, and it is too much to ask the Court to assume that the plea is true because the other party has not brought evidence to impeach it. But be the matter of the report true or false, a report was made to the deceased, and a letter was written on the return of *W. Allen* to *London* to his father, and the letter does particularly advert to the conduct of the party, and the deceased does adopt the information, and acts upon it. True it is, *Mrs. Allen* has said, that although the report was read to the deceased, she does not consider that he could understand it; though he smiled and appeared satisfied when he heard the report ; and he wished her to read it, but she would not read it, and *W. Allen* read it aloud : and there can be no doubt the report was read to him, and he acted upon the report when the execution of the codicil took place.

“ Then the question comes to this, what was the state of the deceased's capacity at the time when this report was made to



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The case stood over for consideration ; and towards the end of the session 1846 it was set down for judgment, but the learned lords who heard the arguments, finding him ? The deceased deals with the matter ; the report is read to him, and reference is made to it in an indorsement made by the deceased himself ; and the Court, unless it were satisfied that the deceased was in a state of incapacity, must conclude that a report so made would naturally lead to the execution of a codicil founded upon it. I think the party is not altogether placed in the situation he ought to be, that of having the witnesses produced, instead of these charges being made behind his back : nevertheless, if the deceased thought proper to place such a power in the hands of *W. Allen*, and adopted the information which he laid before him, the Court cannot disturb a codicil which proceeded from the testator in consequence of a report so made to him.

“ With regard to the state of the capacity of the deceased at the time the information was given to him, the counsel on behalf of *R. Allen* has relied upon the evidence given by *Mrs. Allen*, who says she believes he was not capable of understanding the report or the codicil ; but her evidence is not sufficient to satisfy the Court that his mind did not go with the act, and to entitle it to say that he did not understand the contents of this codicil.

“ The preparation of the codicil was from instructions received from *W. Allen*, it is said, without any direction from the deceased himself ; but *Mrs. Allen* says that *W. Allen* read over the report to the deceased, and the deceased adopted it, and this codicil is in conformity with the report, though there is no proof of any positive direction from the deceased ; but it is proved beyond doubt that the codicil was read over twice to him, and he objected to the legacy given to *Thomas Allen* of 200*l.*, but at the intercession of *Mrs. Evans* he suffered it to remain as part of the codicil ; and *Mrs. Allen* was present, and did not interfere to prevent the execution of the codicil, or represent that the deceased was not in a proper state of mind to perform the act. The medical gentleman who attended the deceased a year and a half before he died, says that he was of perfectly sound mind, memory, and understanding, up to the 10th of *November*, and fully capable of executing a codicil, or of doing any other act of business ; and there are other witnesses who come to the same conclusion, and the Court has no reason to doubt the truth of their deposition.

that they differed in opinion, further postponed the consideration of it.

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*Lord Lyndhurst.*—The case of the appellant is that the revocation by the ninth codicil of the bequests in his favour, was produced by the false and fraudulent representations made to the testator respecting his character and conduct; that these were made for the purpose of imposing upon the testator, whose faculties were impaired by age and disease, and who became the victim of this imposition.

The first question to be considered is the jurisdiction of the Ecclesiastical Court in a case of this nature. Would such a case, if established by evidence to the satisfaction of that tribunal, be a sufficient ground for refusing the probate? Upon this point no doubt can, I think, be entertained. "If a testator be circumvented by fraud, the testament loseth its force." (*g*). There cannot be a stronger instance of fraud than a false representation respecting the character of an individual to a weak old man, for the purpose of inducing him to revoke a bequest made in favour of the person so calumniated. The case of *Grindall v. Grindall* (*h*), before Sir *J. Nicholl*, was founded upon a charge of this description; and though the Court decided against the plaintiff, that decision proceeded upon the failure of the plaintiff's proof, and not upon any doubt of the authority and duty of the Court, if the charge had been established, to refuse the probate. In the course of his judg-

There is nothing to satisfy the Court that the deceased was not perfectly capable of understanding the report, and of giving instructions for this codicil, which was the necessary result of it.

"On the whole of this part of the case, therefore, I am of opinion that the validity of the codicil is fully established, and that the parties are entitled to probate of it, with the will and the other codicils."

(*g*) Swinb., part i., sec. 3, plac. 32.

(*h*) 4 Hagg. 10.

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ment, Sir *J. Nicholl* observed, that "the argument was that the testator's intention of excluding *John Grindall*, and giving the property to Captain *Sturt*, was produced in the mind of the deceased by fraud and contrivance practised upon him." "I cannot," he said, "for one moment, hesitate, after reading the evidence, in holding that the fraud is not proved (and where fraud is charged it must be proved); but on the contrary, I think the probability is most decidedly and infinitely more strong on the other side, viz., that the alteration in the deceased's intention was not produced by any fraudulent practice on the part of Captain *Sturt*; because it is quite clearly proved that the deceased did intend to exclude *John Grindall* as early as the 7th November."

We were furnished, by the kindness of Dr. *Lushington*, during the argument with a reference to a similar case, *Butterfield v. Scawen*, decided in 1775. The question there was whether a will had been revoked in consequence of fraud and imposition practised on the testator. The fraud consisted in a false representation made to the testator, that the woman, who was the principal legatee, had attempted to poison him, and that in consequence of this representation he had revoked the bequest in her favour. That learned judge entertained no doubt as to the jurisdiction of the Ecclesiastical Court to refuse probate, and upon sufficient proof of the facts charged, that it would be its duty to do so. Sir *H. J. Fust*, who was also consulted, expressed himself thus :—"If it should appear, as in the case stated by your Lordship, that an old and infirm testator who had bequeathed a legacy to A. B., had been induced by false and fraudulent representations with reference to the conduct of A. B., made to him for the purpose by C. D., to make a subsequent codicil revoking that bequest, and substituting for it a much smaller legacy, the effect of which would be to give a larger share of the re-

side to C. D. than he otherwise would take, I conceive that the Ecclesiastical Court would not, under such circumstances, grant probate of such revoking codicil, provided it should be clearly established in point of evidence that such act and intention were produced by such false and fraudulent representations."

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I think therefore your Lordships will be of opinion that this is a case coming distinctly within the jurisdiction of the Ecclesiastical Court, and in which, if the charge were established, it would be the duty of that Court to refuse the probate. It did, in fact, come before that tribunal; the parties were heard, and probate was granted.

It is stated in the bill, "that the appellant was confined in the Prerogative Court to grounds of objection which affected the codicil as an entire instrument, and was not permitted to go into the case stated in the bill, or into any other case solely relating to the parts of the codicil which affected only the appellant." The grounds of this alleged decision of the Court are not stated; it may have proceeded from the manner in which the plaintiff shaped his case, from the form of the allegations, or from the nature of the evidence.

It is perfectly clear that the Ecclesiastical Court may admit a part of an instrument to probate, and refuse it as to the rest. There are numerous cases to this effect, as *Billinghamst v. Vickers* (i), *Barton v. Robins* (j). It is, in fact, the constant practice of the Court; but if an error has been committed in this or any other respect, which I am very far from supposing, that would not be a ground for coming to a Court of Equity. The matter should have been set right upon appeal. But the present is an attempt to review the decision of the Court of probate, not by the Judicial Committee of the Privy Council, the proper tribunal for that purpose, but by the Court of Chancery. I

(i) 1 Phillimore, 187.

(j) 3 Phillimore, 455 (note).

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think this cannot be done. It was formerly, indeed, considered that fraud in obtaining a will might be investigated and redressed in a Court of Equity ; but that doctrine has long since been overruled. In the case of *Bennet v. Vade (k)*, Lord *Hardwicke* states that "it has been settled ever since the case of *Powis v. Andrews (l)*, upon an appeal from Lord *Macclesfield's* decree, *February 6th, 1723*, to the House of Lords, that a will cannot be set aside for fraud and imposition here (in Chancery), because a will of personal estate may be set aside in the Ecclesiastical Court for fraud, and of real estate, at law." There are other cases to the same effect before the same learned judge (Lord *Hardwicke*), as *Webb v. Claverden (m)*, and in *Barnesly v. Powel (n)*, where the probate had been obtained by fraud, he observed that, "however formerly doubted, it is now settled by the Lords, in *Kerrick v. Bransby (o)*, that this Court (of Chancery) cannot set aside a will of personal estate for fraud." "I will not," he adds, "infringe upon what is laid down there, and in *Powis v. Andrews.*" "But there is a material difference," he continues, "between this Court taking upon itself to set aside a will of personal estate on account of fraud or forgery in obtaining or making that will, and taking from the party the benefit of a will established in the Ecclesiastical Court by his fraud, not upon the testator, but upon the person disinherited thereby and claiming after the testator's death against it. Fraud in obtaining a will infects the whole ; but the case of a will, of which the probate was obtained by fraud on the next of kin, is of another consideration." The case of *Jones v. Frost (p)*, and of *Jones v. Jones (q)*, are to the same effect. So in *Archer*

(k) 2 Atk. 324.

(l) 2 Bro. P. C. 504.

(m) 2 Atk. 424.

(n) 1 Ves., sen. 287.

(o) 7 Bro. P. C. 437.

(p) 3 Madd. 1.

(q) 3 Meriv. 161.

v. Mosse (r), which was a very gross case of imposition on a sick and weak man, the Lord Chancellor observed that while the probate stood, this matter was not examinable in Chancery; and though, as the reporter observes, the fraud was fully proved and opened to him, he would not have any proof read, but dismissed the bill. In *Plume v. Beale* (s) it was alleged that a legacy in favour of the defendant had been interlined by her after the will was executed. A bill was brought to be relieved against this legacy. The will had been proved in the Ecclesiastical Court, with the legacy. The Lord Chancellor (Lord Cowper) said the will should have been proved with a reservation of this legacy; the remedy must be there, and the bill was dismissed.

It was contended that, although this Court cannot set aside the codicil for the fraud and imposition practised upon the testator, it can effect the same object indirectly by declaring the defendants trustees for the plaintiff; but if the fraud was cognizable by the Ecclesiastical Court, and would, if established, have been a ground for refusing the probate, to adopt the course suggested would be in effect, as I have already observed, to make the Court of Chancery a Court of appeal from the Ecclesiastical Court, a course the more objectionable in the present instance, the case having been decided after a full hearing by that Court. In the case of *Kerrich v. Bransby*, referred to by Lord Hardwicke, which was a case of fraud and imposition in obtaining a will, it was argued on the part of the appellant, in this House, as in the present case, that the probate in the Ecclesiastical Court was not impeached by the decree, though the appellant was restricted, as in justice it was said he ought to be, from taking any beneficial interest under it, and such indeed was the effect of the decree; this House, however, reversed the decision. Doubts

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(r) 2 Vern. 8.

(s) 1 P. Wms. 388.

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have been suggested as to the grounds of the reversal ; but Lord *Hardwicke*, who held the Great Seal within a few years after the decision was pronounced, expressly states that it was reversed upon the point of jurisdiction. Such has always been the understanding of the Profession ; and in *Ex parte Fearon* the Lord Chancellor observes (*u*) that the determination in *Kerrich v. Bransby*, was “ that this Court cannot take cognizance of wills of personal estate as to matter of fraud.”

There are cases, undoubtedly, in which the Court has declared the legatee or executor to be a trustee for others, as in the case of *Thynn v. Thynn* (*v*), where the defendant induced his mother, by false representations, to prevail on the testator to name him sole executor to his will, declaring that he would only be an executor in trust for her. This, the reporter observes, being a fraud, as also a trust, the Lord Keeper declared it for the plaintiff. *Marriot v. Marriot* (*w*) has been much relied upon as containing the opinion of Chief Baron *Gilbert* upon the subject. The judgment was not delivered, but I lay no stress upon that circumstance. The Chief Baron mentions three cases in which a Court of Equity “ may declare a trust upon a will according to the real intention of a testator, although it be not contained in the will itself: first, where the drawer of a will inserts his own name instead of the name of the legatee ; no doubt,” he adds, “ he would be a trustee for the real legatee.” But if probate were refused in such a case on account of the fraud, the real legatee would lose his legacy. The other two cases which he puts are not cases of fraud, but of trust, the one express, the other implied, and do not affect the present question.

In the case of *Kennell v. Abbott* (*x*), the testatrix gave an estate to her brother, in trust to sell, and out of the

(*u*) 5 Ves. 647.

(*v*) 1 Vern. 296.

(*w*) Gilb. Cas. in Cha. 203

(*x*) 4 Ves. 802.

monies arising therefrom to pay her husband, *Edward Lovell*, the sum of 150*l*. *Edward Lovell* was not her husband, but she believed him to be so up to the period of her death. He had been previously married to another woman, who was living at the time of his marriage with the testatrix. The legacy was given to him as her husband; that could alone, as Lord *Alvanley* observed, be supposed the motive of the bounty. The legacy, therefore, failed. This was a question of construction, and upon a trust, and came properly within the jurisdiction of a court of equity

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In the case of *Barnesly v. Powel* (y), the probate was obtained by fraud, and Lord *Hardwicke* drew the distinction to which I have already adverted, between a fraud on the testator and a fraud practised after his death in obtaining the probate. He thought, in the latter case, the Court might declare the party a trustee. This, he said, was a ground of jurisdiction in the Court distinct from the will itself. The distinction taken is decisive as to the opinion of Lord *Hardwicke*, that in a case like the present—a case of alleged fraud practised on the testator himself—the Court of Chancery could not take cognizance of the matter and apply a remedy by means of a trust. If this, indeed, could properly be done it would follow that in none of the numerous cases to which I have referred, ought the bill to have been dismissed. The attempt was made in *Kerrich v. Bransby* (z). The bill prayed that the will might be cancelled, but this part of the prayer was not adopted in the decree, which merely directed that the legatee should account to the plaintiff, and that the plaintiff should be at liberty to use his name to get in the personal estate; in effect treating him as a trustee. This House resisted the encroachment and reversed the decree.

(y) 1 Ves., sen. 284.

(z) 7 Bro. P. C. 437.

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In the case of *Segrave v. Kirwan* (a), the Ecclesiastical Court could not, upon the question of probate, have applied the proper remedy. The testator intended *Kirwan* to be his executor, but did not intend that he should take anything under the will. The question in *Podmore v. Gunning* (b) had reference to an express trust. The case of *Bulkley v. Wilford* (c), has no application to the present case.

I will conclude by observing generally, that I think it will be found upon examining the cases in which this Court has declared a legatee or executor to be a trustee for other persons, that they have been either questions of construction, or cases in which the party had been named a trustee, or had engaged to take as such, or in which the Court of Probate could afford no adequate or proper remedy. If there be any decision that goes beyond this, I must, with all deference, be permitted to doubt its correctness. I will only add, that if the rule, which I have stated, be an inconvenient one, still, if it has been sanctioned by this House, the Court below was bound by it, and your Lordships alone can apply a remedy.

The Lord Chancellor.—I very much regret the necessity which I am under of differing from the conclusion to which my noble and learned friend has come in this case. It is a case of extreme importance; for if your Lordships should affirm the judgment pronounced by the Court of Chancery, in my opinion, the jurisdiction of the Courts of Equity, as it has been administered from all time, will be most materially affected.

My Lords, this is upon a demurrer, and I am therefore under the necessity of calling to your Lordships' recollection, that what may be said to have passed as to matters

(a) 1 Beat. 157.

(b) 7 Sim. 644.

(c) 2 Clark & Fin. 102.

of fact, or as to the course to be pursued by other Courts, cannot be attended to beyond what appears upon the face of the bill. Now this bill states that the codicil not only affects the interest of the party, the appellant, but provides various other legacies and arrangements for other parties, and then it states, that the Ecclesiastical Court granted probate to the party named as executor after an attempt by the appellant to prevent such probate being granted on the ninth codicil, on the ground that the testator was of unsound mind at the time of the execution, and that undue influence had been exercised upon the mind of the testator in procuring such execution; and then it proceeds to state, that in the suit which arose in the Prerogative Court, touching the validity of the ninth codicil, the appellant was confined by the Court to the grounds of objection which affected the codicil as an entire instrument, and was not permitted to go into the case stated in the bill, or into any other case solely relating to the parts of such codicil which affected only him.

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Now, my Lords, whether that statement be in fact correct or not, we are bound upon this demurrer to consider it as an accurate representation of what passed. There is therefore in this case a judgment of the Ecclesiastical Court, that it cannot enter into the question which affects the right of this appellant. It states the attempt to have been made, and the attempt to have been objected to by the Court, and the Court to have proceeded upon this ground only, that it could not listen to any objection as to any particular provision in the codicil, but that it was bound only to look at objections which went to the validity of the codicil itself. The case of fraud stated upon this bill, I must assume to be capable of proof, and if proved it is sufficient to give the plaintiff right to relief somewhere. It states a prior provision largely made for his benefit, and a codicil obtained from the testator by contrivance,

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conspiracy, and misrepresentation, which had the effect of procuring and producing this ninth codicil, which was a revocation of those benefits which were intended for the appellant. The facts therefore stated are that in the Ecclesiastical Court there is no remedy; that an attempt has been made to obtain a remedy, and that the attempt has failed upon a rule, which, according to the statement made upon the face of this bill, the Court acted upon—that it could not interfere in any question affecting any particular part of the codicil, but only in one affecting the whole of the codicil. That is so stated, and those who know the meaning of a demurrer, must know, that that is a statement from which none of the parties can depart.

Now, if that which is stated be taken as the fact, and if there be no remedy in the Ecclesiastical Court, and if (because we are not sitting here as reviewing any proceeding of the Ecclesiastical Court, and are not competent so to do) we are to say that the Court of Chancery has no jurisdiction to investigate this matter of imputed fraud, where is the plaintiff's remedy? It is obvious that he has none. If the Ecclesiastical Court has come to a wrong decision, and if that decision is capable of being reviewed, is that a reason why a Court of Equity should not interfere? The whole confusion appears to me to result from this, that the two proceedings are confounded, which are in their nature perfectly and entirely distinct. The Court of Chancery has nothing to do with a probate, or with the enquiry whether a certain paper be the will of the testator or not, it never interferes in such a matter. In those early cases to which my noble and learned friend referred, it did interfere, but it does not now interfere with questions which are questions solely for the consideration of the Ecclesiastical Court. But when the Ecclesiastical Court has vested in an individual the legal title to property, by granting him probate, then the Court of Chancery assumes that jurisdiction which belongs to it

over all titles, over all interests, over all estates, where a proper case arises of attaching a trust upon that individual. It does so with land, it does so with money, it does so with every species of property.

If a testator were to devise land to trustees under circumstances which would create a resulting trust for an heir at law in equity, so as to entitle him to the benefit of it, would it be any answer to a bill filed by the heir claiming the resulting trust from the devisees to say, "you are quite wrong; to be sure the devisees have recovered in ejectment, they have got possession of the land, but it is all wrong; and if you try it over again, it will be found that there is no proper devise to the trustees, and therefore you must go to law to try whether the devise to the trustees be good or bad. If the devise be bad, the trial which has taken place was not a good trial, and the result is such a result as in law it ought not to be; there is no devise, do not therefore come here to a Court of Equity to ask for a decree declaring a resulting trust, because a Court of Law is the place where questions arising upon real estate are to be tried; go there, and see whether you cannot get rid of the devise." If the case stood thus, I apprehend that to any person, who knows any thing of the Court of Equity, it would appear perfectly ridiculous. But I would beg leave to ask, where is the difference? The only difference is this, that the Courts which decide upon real estate in questions of land are the Common Law Courts of the country. Here the Court which has decided upon the legal estate under the probate is the Ecclesiastical Court. In both the one case and the other, the decision is, as to the legal title, totally and entirely unconnected with that which is the province of the Court of Equity only, namely, a proper case of trust in a legal estate.

If this were a new case, if cases had not occurred, over and over again, from the earliest time, in the Court of

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Chancery, there might be some difficulty perhaps in persuading your Lordships to agree to it as being the practice of the Court of Equity, but from the earliest time it has been the practice of the Court.

And now I will just observe upon one point which arises upon the face of the bill. Certain learned doctors of eminence, whose opinions upon the cases which they decide are entitled to the highest consideration, seem to have been consulted, not upon this demurrer, but upon some abstract propositions, and thence they appear to have inferred that the Ecclesiastical Courts are competent not only to grant or refuse, or recall probate of the whole codicil, but to recall probate so far as it may affect a particular part of the codicil. My Lords, I am not disposed to controvert that, though it is not at all necessary in the present case to give an opinion upon it; but this I know, that if it be the rule, it infinitely multiplies the number of cases against the decision now under appeal, because in every case where a trust has attached upon a probate, there must of course always have been a decision of the Ecclesiastical Court upon the legal title. In all those cases therefore, whether affecting the whole instrument or affecting a part of the instrument only, according to the opinions which we have heard from my noble and learned friend, there would be a probate and a power within the Ecclesiastical Court of deciding the particular point which a Court of Equity has been called upon to decide. So that if that be so, and I am not disposed to controvert it, all the cases in the books, in which a trust has attached upon a fraudulent bequest, are authorities where a Court of Equity has intervened, although the Ecclesiastical Court might have intervened; when I say that, I say that my noble and learned friend might have brought hundreds of cases against the conclusion to which he has come, because he has confused the difference which in some cases is taken between an objection to a part of a testamentary instru-

ment, and an objection to the whole testamentary instrument.

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My Lords, in order to show that this distinction is not new, and that the rule of law which I have to submit to your Lordships' consideration is not of modern invention, I must refer to one or two authorities in which that distinction is taken, a distinction which is no longer available, because all the cases now would be authorities against the non-interference of a Court of Equity, because, in all cases the Court of Probate would have the power of interfering in the transaction. Lord *Redesdale* says (*e*), "Where the fraud practised has not gone to the whole will, but only to some particular clause; or if fraud has been practised to obtain the consent of next of kin to the probate, the courts of equity have laid hold of these circumstances to declare the executor a trustee for the next of kin." That is the deliberate opinion of Lord *Redesdale*, which has been received by the profession ever since it was published; and it is not a new opinion of Lord *Redesdale's*, because he refers to the argument, not the judgment (for it was not delivered), of Chief Baron *Gilbert*, an argument intended for a judgment, and which he printed with his reports (*f*). He says "Courts of Equity may, in notorious cases, declare a legatee, who has obtained a legacy by fraud, to be a trustee for another, as if the drawer of a will should insert his own name instead of the name of a legatee, no doubt he would be a trustee for the real legatee: and nobody has thought that the declaring a trust in those cases is an infringement upon the Ecclesiastical jurisdiction."

As the cases are all to be found in the printed report of this case (*g*); I will not occupy your Lordships' time by referring to many cases, in which the prin-

(*e*) Treat. on Plead. 257,
(4th edit.)

(*f*) Gilb. Cas. in Cha. 203.
(*g*) 1 Phil. 133.

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ciple is laid down which has been acted upon by the Court ; but I beg to call attention to the distinction between this case and the objection which is made, that this would make a Court of Equity a Court of review, or a Court of appeal from the Ecclesiastical Court. If the Court of Chancery were to take upon itself to do now what it did formerly, to declare a will or codicil void upon the ground of fraud, no doubt it would be exercising the same jurisdiction as the Ecclesiastical Court exercises, and it would be open to that objection, but it never now attempts to do any such thing. The present bill is not founded upon any such principle, it asks no such relief. It gives credit, as it is bound to do, to the act of the Ecclesiastical Court, which has clothed the executors with the power of executors, and given them a legal title to the property, and all that the bill asks is that upon the proof (and we are now upon the assumption of the proof of the facts as stated) of the facts alleged upon the face of the bill, those persons who had so obtained that ninth codicil by fraud, may not be permitted to enjoy the property themselves, but may be declared to hold it as trustees for those persons who would have been entitled to it if that fraud had not been practised.

Some of your Lordships are extremely well acquainted with the practice of the Court of Chancery, and I would ask whether we are now to repudiate the doctrine that Courts of Equity will attach trusts upon fraudulent wills ; because, if this judgment be affirmed, it will be impossible, particularly now, after the distinction between whole testamentary papers in cases of fraud, and particular provisions in testamentary papers, to maintain that doctrine. Upon what principle can a Court of Equity hereafter say, that a legatee is trustee for another ? The answer will be at once, that “ the House of Lords has decided in the case of a particular legacy, being one among other provisions : we will not look at the fraud, we exercise no ju-

jurisdiction over it, because you may go to the Ecclesiastical Court, although that Court has decided against you ; we think the Ecclesiastical Court is wrong, if the facts you have stated are true, but you must go to some Superior Court of appeal from the Ecclesiastical Court and get yourself righted." First of all, we have nothing to do with the Ecclesiastical Court : we are not going to review their proceedings. What your Lordships are now asked to do is to administer justice as a Court of Equity to a party, who, upon the facts stated, is clearly entitled to it, and who states that the tribunal which has been applied to has refused, and the Court of Chancery is to refuse its assistance because another court ought to have done it, and has not. My Lords, the jurisdictions are totally distinct ; the Ecclesiastical Court cannot do what the plaintiff is asking the Court of Chancery to do. The Ecclesiastical Court may, possibly, indirectly produce the same effect ; it may refuse the probate, or, by a process of which I have yet to learn the details, it may strike out of the codicil a particular provision. But if that Court has that jurisdiction—if it has that power—that is not to deprive the Court of Equity of another jurisdiction, and another power founded upon totally different principles ; and were that to be done the very foundation of the jurisdiction of the Court of Chancery would be gone, because the legal estate would be disposed of before the Court of Chancery intervened ; but so long as the legal estate remains—so long as there is a title existing in a party under the decree of the Ecclesiastical Court which is adverse to the claim under the will, and which claim ought to prevail against him, if the case set up by the other parties is true,—so long as that circumstance exists, it is, and has been, from the earliest times, the province and jurisdiction of the Court of Chancery to attach a trust upon that estate so obtained by fraud ; if that description of fraud be established, it is yet the duty of the Court of Equity to say, " What you have

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got you shall not keep, because you have obtained it by fraud; or even if you show it to be by a legal title which we cannot touch, we will take care that you shall not hold it for your own benefit, but as trustee for those who have been wrongfully deprived of it."

If I were to go through the whole of the cases which have been referred to, they would all and every one come to the same result; whether they apply to the whole or to parts of instruments, there is no distinction to be made. In every case where there has been a legal title derived from the Ecclesiastical Court; in every case where the plaintiff has succeeded, the Court has upon that legal estate, so established by the Ecclesiastical Court, fastened a trust and given the benefit to those who are entitled to it.

Upon these grounds I regret to say that I am obliged to differ from the motion of my noble and learned friend.

Lord Brougham.—I have, as it was my duty to do, very fully considered this case, upon which my two noble and learned friends have differed, and I have come to a conclusion against the decision at the Rolls, and in favour of the decision in the Court of Chancery. If I am wrong in the opinion at which I have arrived, I shall deeply lament it; for the question, I admit, is one of no common importance. But at least I have the satisfaction of feeling in my own mind assured that if I am in error, I have not fallen into it lightly, for I have most deliberately considered the case both in respect to the arguments, which were held at the bar, and to the authorities which were cited: and I have also taken to my assistance in this case, which is a case of some difficulty and of much importance, the lights given by the conclusions of the learned judges of the Ecclesiastical Court, to which reference has been made by my noble and learned friend who first addressed the House. I now, therefore, come prepared to give my opinion differing from my noble and learned friend

who spoke last, and agreeing with my noble and learned friend who preceded him, in favour of the judgment under review, the judgment of the Court of Chancery.

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I entirely agree with my noble and learned friend who spoke last, and nobody can doubt it, that being here deciding upon demurrer to a bill, we are to take the bill as containing a true statement of the facts; we are bound to assume that all those facts are as they are set forth in the bill, because a demurrer, from its very nature and effect, admits the facts and says, "What then; you have no right to your remedy!" But my noble and learned friend seemed to me to carry the argument rather too far; he stated that the bill set forth not only that in the Court of Probate the party was not permitted to enter into the case stated in the bill, or into any other matter relating exclusively to those parts of the codicil which affected the plaintiff alone, but was confined by the Court to those grounds of objection which affected the codicil as a whole: and my noble and learned friend appeared to me, as I understood him, to go a little further than he was warranted in doing, and to have assumed the fact that the Court had not the power of doing that which the bill complains it refused to do, and the complaint of which refusal is the ground of appeal by way of a bill in equity.

Now it is one thing to say that the bill states a fact which we are bound by the demurrer to admit, viz., that the Court below did in point of fact confine the plaintiff to the objections to the codicil as one entire instrument: It is one thing to say that which, I do not deny, and it is a very different thing to say that not only did the Court of Probate in fact refuse relief, and confined him within those particular limits, but that the Court was right in so doing, and had no means of doing otherwise. The Court of Probate is not alleged in the bill to have been right in so doing, or to have had no power of doing otherwise; the Court is only alleged in point of fact to have refused to

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allow the plaintiff to go into his objections to particular parts of the codicil, that is all.

But I will go a step further, and I will suppose that the bill had alleged, which it does not, that the Court of Probate had no power to allow the plaintiff to go into that case, but was bound by the law of the Court of Probate to confine itself to the objections to the codicil as one entire instrument. I do not think that the demurrer can be understood to admit that point of law. A demurrer admits facts, such as that the Court of Probate refused relief, but a demurrer never admits points of law, such as that the Court of Probate was right in that refusal. Take the demurrer, therefore, in either way, whether as admitting in point of fact (and you are bound to believe the point of fact, and to assume that it is correct) or as admitting the allegation in point of law (which would be most incorrect), that the Court of Probate has no power to give any other decision than that which it gave; taking it in either way, it appears to me that the view taken by my noble and learned friend is not borne out. I do not consider it to be at all admitted that the Court of Probate had no such right. I am bound, out of respect to the Court of Probate, not to quarrel with its decision, but to believe that it decided correctly; but of this I am perfectly sure, that if the Court of Probate decided incorrectly, there was a remedy, and that remedy was by appeal to the Judicial Committee of the Privy Council. The remedy was not by going to the Court of Chancery.

My noble and learned friend says that the Court of Chancery is not to be considered as the Court that is to be applied to as the Court of appeal from the Court of Probate; but the course here taken amounts to nearly the same thing. In this case eight codicils gave A. B. certain benefits, and the ninth codicil, which is admitted to probate, took away those benefits; the party claiming under the first eight codicils, and whose claim is defeated by the

ninth (the revoking codicil) being admitted to probate, comes to the Court of Chancery and says, "Make C. D. a trustee for me." That is the way of stating it ; but in substance and effect it amounts to one thing, namely, " Revoke the ninth codicil, that codicil which, revoking the first eight codicils, has been admitted to proof. I complain of the ninth codicil as having been obtained by fraud ; declare that notwithstanding the ninth codicil, which revokes the first eight, I am entitled to the benefit under the first eight." That is the prayer of the bill in so many words.

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Now it is admitted by all the cases, and it cannot be denied, that you cannot come to a Court of Equity to set aside a will of personalty as being obtained by fraud ; if any doubt were entertained on the point, there are the cases of *Plume v. Beale*(*h*), and *Kerrich v. Bransby*(*i*), —which last is entitled to great consideration from the fact that Lord *Macclesfield*, who decided it, appears to have differed from the decision of Lord *Cowper* in *Plume v. Beale*, and to have allowed the parties to go into a discussion for setting aside the will as obtained by fraud ; but when that case came before the House of Lords, Lord *Macclesfield's* decision was reversed.

Much has been said of *Kennell v. Abbott* (*j*), and of *Marriot v. Marriot* (*k*), which is reported by *Strange* and by Chief Baron *Gilbert*, and was a judgment of that most able judge ; though I believe a judgment never delivered in Court ; for the case was compromised. That therefore, *pro tanto*, lessens the effect of it, but still it would be a most important authority, and so would *Kennell v. Abbott* before Lord *Alvanley*, a very peculiar case according to my

(*h*) 1 P. Wms. 388.

(*i*) 7 Bro. P. C. 358.

(*j*) 4 Ves. 802.

(*k*) 1 Str. 666 ; *Gilb. Cas.*
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recollection of it. The legacy in that case was bequeathed on the supposition that the party in whose favour it was given was the husband of the testatrix ; it turned out that he was not, and the legacy fell into the residue. In the reports of the case,—as is observed in the judgment from which this appeal was brought,—we do not get any distinct account of what the fraud was, and I do not think therefore that it will weigh much in the present decision.

One thing may be said, no doubt, and it goes, I think, rather in favour of the decision of the Court below, and of the view taken by my noble and learned friend (Lord *Lyndhurst*). How, in the case of great fraud being practised by one party against another, the effect of which may be to swell the residue, is the Court of Chancery ever to get at that fraud, if probate of the instrument has been refused by the Ecclesiastical Court? That is very true, but in all such cases, if the judge of the Court of Probate sees reason to suspect that there ought to be relief in respect of fraud, a judicious mind would naturally lean towards granting probate, in order that the case might come before a Court of Equity, whereas it never could if the probate were refused. I should say that if the Court of Probate has not the power of giving relief, the judge there is bound to grant probate, in order that those who have the power may be able to exercise it, and grant redress. If the Court of Probate refuses to grant it, there is no harm done, or, at least, no harm ought to be supposed to be done, because then there is an appeal which the constitution provides, not to a Court of Equity, but to the Court of Probate in the last resort, formerly the Court of Delegates, now the Judicial Committee of the Privy Council.

Upon these grounds (and what I have stated to your Lordships is out of the great respect I feel for both my noble and learned friends who differ from each other, and

on account of the importance of this case, and I have therefore gone into it at greater length than otherwise I should have done); upon these grounds I agree with my noble and learned friend [Lord *Lyndhurst*] that the judgment of the Court below, allowing the demurrer and reversing the order of the Master of the Rolls, ought to be affirmed.

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Lord Langdale.—My Lords, without attributing to the demurrer a greater effect than it ought to have, there is upon the record, as it now stands, an admitted case of fraud—of fraud committed upon the testator, and of fraud committed upon the legatee. It does not appear to me correct to say, that the fraud was practised upon the testator only; and considering the fraud to have been practised upon both the testator and the legatee, the question is, whether a Court of Equity, after probate granted, had any authority to give relief? Being myself of opinion that such relief might be given, I overruled the demurrer when the case was heard before me. My noble and learned friend, then Lord Chancellor, being of a different opinion upon the rehearing of the case, reversed my order, and allowed the demurrer. Had the case gone no further, it would have been my duty to conform to his Lordship's decision in all future cases of a like nature; and after the case was brought to your Lordships' House, I should, if left to act according to my own inclination, have awaited your Lordships' final determination, without taking any part in the discussion. My noble and learned friend, however, who allowed the demurrer in the Court of Chancery, desired my attendance here, and though I wished to be excused, I could not obtain his leave to be absent, and I attended at the hearing of the argument, as I attend to-day, at his particular request.

Under those circumstances I have considered this case, uninfluenced entirely, I hope, by any bias in favour of my

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formerly expressed opinion, and so far as I have been able, uninfluenced by the authority of my noble and learned friend, to which I owe so much deference and respect. Having so considered this case, I find it my duty to declare that I still continue to be of the opinion on which I at first entertained, that if the alleged facts be proved, the Court of Chancery has jurisdiction in this case; that the jurisdiction is supported by cases carrying with them sufficient authority, and that the jurisdiction is most important for the suppression of a considerable class of frauds.

It has been observed that there are early cases in which the Court of Chancery took upon itself to set aside wills both of lands and of personalty, not only for fraud, but for other causes, and even because wills had not been, as the judge thought, properly made, though there had been no fraud; those cases, however, had long since been overruled. It was established by the cases of *Archer*, *Mosse* (l), *Nelson v. Oldfield* (m), *Plume v. Beale* (n), and, above all, by *Kerrich v. Bransby* (o), that the Court of Chancery had no authority to set aside a will of personalty, and no authority to set aside a will of land without a trial at law. For many years past this position has not been questioned; but it has been sometimes argued (as it appears to me, very erroneously), that the Court of Chancery, because it has no authority to set aside wills, has, therefore, no authority to give a remedy against frauds effectuated by the means of wills. The case is far otherwise. It appears to me that the Court of Chancery has always exercised the authority of attaching trusts to legal rights, which have been obtained by fraud, so as to relieve the sufferer against the effects of such fraud. However legal rights may have been acquired, the

(l) 2 Vern. 8.
 (m) 2 Vern. 76.

(n) 1 P. Wms. 388.
 (o) 7 Bro. P. C. 358.

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After the learned arguments addressed to the House on both sides, it is not necessary to go into a minute examination of the authorities; but I will take the liberty of stating that soon after the time when Lord *Macclesfield* decided the case of *Bransby v. Kerrich*, by treating a will relating both to real and personal estate, as if the Court of Chancery would set it aside (a decision which was clearly erroneous and was by this House declared to be so); very soon after that time Lord Chief Baron *Gilbert* prepared the judgment, which has been referred to in *Marriot v. Marriot (p)*. That judgment appears, by the report in *Gilbert's Cases*, not to have been delivered, but it is fully stated, and though it was not a judgment actually delivered, yet it contains the opinion of that very eminent judge. That case gives the history of the jurisdiction in testamentary matters in a manner which I do not think any one can read without instruction; and after carefully considering several points bearing upon the case, his Lordship comes to a conclusion in conformity with the final decision in *Kerrich v. Bransby*. He then gives certain cases in which the Courts of Equity may grant relief, notwithstanding probate has been granted. He says, "Courts of Equity may declare the party who has obtained a legacy by fraud to be a trustee for the party who has been defrauded." But according to the argument used in support of the demurrer in this case, if the legacy was obtained by fraud, the Ecclesiastical Court has jurisdiction on that, and might grant probate of the will, with the exception of that particular legacy, and, therefore, the Court of Chancery has no jurisdiction. But this is not the doctrine or opinion of Chief Baron *Gilbert*; he says "the Court of Chancery may declare a legatee who has obtained a legacy by

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fraud to be a trustee for another; as if the drawer of the will should insert his own name instead of the name of a legatee." Here it is supposed that probate has been granted by the Ecclesiastical Court, and yet the doctrine is that a court of Equity may grant relief by declaring a party a trustee. Further, he says, the Court, "to answer the real intention of the testator, may declare a trust upon such will, though it be not contained in the will itself, in these three cases: first, in that of fraud upon a legatee before mentioned; secondly, where the words import a trust for relations, as in the case of a specific devise to executors, and no disposition of the *residuum*; thirdly, the case of a legatee promising the testator to stand as a trustee for another." I conceive that the cases stated are by way of example and not in exclusion of other cases falling within the same principle, and I am not aware that the position of Lord Chief Baron *Gilbert* has ever been questioned till the question arose in the present case.

The case of *Barnesly v. Powel* (p), a case before Lord *Hardwicke*, appears to me to be a much stronger case even than *Marriot v. Marriot*, to show in what way a court of equity may deal with a case of fraud in these matters. It is only necessary to refer to what was done in that case; it was a case of forgery; the forgery was not quite apparent at first; the judge, therefore, sent it to trial, and, afterwards, when the forgery was established, it appeared also that there was another testamentary instrument, which might perhaps appear to be valid in the Ecclesiastical Court, so that his Lordship did not dispose of the whole matter himself, by at once declaring a trust, but, leaving it to the Ecclesiastical Court to decide whether the testamentary instrument, not appearing to be forged, was valid or not, he ordered the forged instrument

ment to be brought in, and by his own jurisdiction and power over the person, and not assuming any jurisdiction to revoke or alter the probate, he ordered the party to appear in the Court of Delegates, and consent to the reversal of the sentence for granting the probate. The Court of Chancery was admitted to have no authority to set aside the sentence or the probate; yet Lord *Hardwicke*, upon the first hearing, before the fraud was established, with reference to the fraud, considered as then proveable, said he should not scruple decreeing that the defendant, who obtained that probate, should stand as a trustee in respect of the probate; and, afterwards, when the fraud was proved, he compelled the party to consent to the reversal of the sentence by which the probate was obtained; Lord *Hardwicke* desired not to interfere with the jurisdiction of the Ecclesiastical Court, and at the same time not to refuse to the suitors of the Court of Chancery the exercise of the jurisdiction by which it has in all times been so instrumental in the suppression of fraud.

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The only other case to which I would call your Lordships' attention is the case of *Segrave v. Kirwan* (q), before Sir *A. Hart*. That was not a case of fraud, but a case of implied trust, founded on the non-performance of a duty. The same doctrine was there held, and though the question of jurisdiction, on the ground of fraud, did not arise, the opinion of Sir *A. Hart* on the subject is clear; and when the case was afterwards commented upon by Lord *Eldon* in the case of *Bulkley v. Wilford* (r), it is very improbable that he should not have observed on the opinion of Sir *A. Hart*, in that respect, if he had thought it erroneous.

It is upon the opinion of Chief Baron *Gilbert*, in the case of *Marriot v. Marriot*, the opinion and orders of

(q) Beatty, 157.

(r) 2 Clark & F. 177.

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Lord *Hardwicke* in *Barnesly v. Powel*, and the opinion of Sir *Anthony Hart* in *Segrave v. Kirwan*, that I principally rely for the support of the jurisdiction of the Court of Chancery in the present case; they are, I think, sufficient, without referring to other authorities of less general and distinct application. It appears to me that if your Lordships should allow the present demurrer, these cases, which have not (as far as I am aware of) been hitherto impugned, will be overruled.

Lord *Campbell*.—I am happy to think that it is not necessary for me to occupy much of your Lordships' time, after the ample discussion which this case has undergone by my noble and learned friends who have preceded me. But upon a question of such great importance, to which I have paid the most anxious attention, I feel it my duty to state the reasons which induce me to concur in the motion of my noble and learned friend, that the decree appealed from be affirmed. I do this without, in the slightest degree, wishing to encroach upon the jurisdiction of the Court of Chancery. I wish to guard against what I should consider to be an encroachment by the Court of Chancery upon the jurisdiction of another Court; for the question seems to me to be, whether an appeal from the Court of Probate shall be to the Court of Chancery or to the Judicial Committee of the Privy Council?

Now, be it well understood that I give implicit credit to every fact that is stated upon the face of the bill. I know that if there be a demurrer, it admits the facts that are alleged in the bill. It admits facts that are well pleaded, but not alleged inferences of law; and it is because I give implicit credit to every thing which is stated in point of fact in this bill, that I am of opinion that in this case the Court of Chancery has no jurisdiction.

According to the allegations of the bill, the probate of the part of the codicil which concerned the plaintiff, ought

not to have been granted. It is not denied that the Ecclesiastical Court had jurisdiction over the subject. It is not denied that the Ecclesiastical Court might have refused to grant probate; and the distinction attempted to be drawn between the powers of the Court of Probate over a will and a part of a will, or over a whole codicil and a part of a codicil, cannot be supported.

Upon the authorities cited by my noble and learned friend (Lord *Lyndhurst*), it is quite clear that the Ecclesiastical Court had jurisdiction to refuse probate of that part of the codicil which affects the appellant, because giving credit to the facts stated, that part of the codicil was not the will of the testator; he was imposed upon; and probate of that part of the codicil ought to have been refused. My Lords, it appears to be so when we examine the books, as well as upon reason and common sense; but we have the authority of the two judges who now preside in the Courts of Probate, Sir *Herbert Jenner Fust* and Dr. *Lushington*, who have both been consulted in this case, and who have both favoured us with their opinions, to which I give implicit credence. They assure us that upon such facts being proved before the Ecclesiastical Court, that Court would be bound to refuse probate. Then it clearly comes to the question which my noble and learned friend stated, had the Ecclesiastical Court jurisdiction over this matter to refuse probate, and was their decree a right or wrong one?

Now I must be permitted to say that my noble and learned friend, the Lord Chancellor, argued the whole case upon the supposition that the decree of the Ecclesiastical Court in granting the probate was right,—that there was a legal estate duly conferred by that probate upon the legatee, who was claiming under the ninth codicil. But giving credit to the facts alleged in this bill, that decree was clearly erroneous. I believe, as the bill states, that the Eccle-

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siastical Court refused to allow the plaintiff to enter into any examination of a particular part of the codicil separate from any objections that might apply to the whole; but in my opinion that was wrong. My noble and learned friend who last addressed your Lordships, very properly says, that this is a case in which there has been gross fraud, and that the party who availed himself of this fraud ought not to be allowed to enjoy the fruits of it. I entirely concur with him in saying so; but the question is, by what means shall justice be done? I say that the proper proceeding would have been an appeal from the decree of the Ecclesiastical Court to the Judicial Committee of the Privy Council, where the probate granted of the ninth codicil would have been reversed. If there has been probate erroneously granted by the Ecclesiastical Court, what is the remedy? If you say that in this case the party may apply to the Court of Chancery, and may file a bill which shall make the legatee a trustee for the next of kin, or for any other party seeking to set aside that part of the codicil, just see the consequence: in every case, by this contrivance of making the party who would be beneficially interested a trustee for another, you do indirectly that which the law forbids you to do directly. The law says that the Court of Chancery has not jurisdiction over a will of personal property; it cannot set aside a probate of personal property. Well, then, if you are not allowed to file a bill to set aside the probate, shall you be allowed, in every instance, to file a bill to declare the party in whose favour the probate is granted to be a trustee for the next of kin, or for some other party? Wherever you wish to find fault with the probate which the Ecclesiastical Court has granted, you have only to file a bill and to pray that the party in whose favour the probate has been granted may be declared a trustee. Nay, my Lords, by this process you might review the sentence of the Ecclesiastical Court in *refusing* probate; because, let

me suppose that the Court refuses probate, and grants administration to the next of kin, then, the Court having refused probate and granted administration to the next of kin, the party who claims under the will would file his bill, and would pray that the next of kin may be declared to be trustees for the legatee, and in that manner you might in every instance have an appeal from the Court of Probate to the Court of Chancery. That has never been the practice of our judicial constitution; the appeal from the Ecclesiastical Court formerly was to the Court of Delegates; it is now to the Judicial Committee of the Privy Council.

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The reasoning on the other side proceeds upon the supposition that there is what we may call a legal estate in the legatee. I must take the liberty to say that I consider that an entire fallacy; the legatee has no right. Probate ought to have been refused, and the refusal of probate would have done complete and final justice between the parties. This is totally different from the case of a legal estate being decided by a Court of law to be in a particular individual. In such a case there is no remedy whatever except by filing a bill in the Court of Chancery, and having the party in whom the legal estate is, declared to be a trustee for the party whom he has defrauded. We have a very well known example of that in *Bulkley v. Wilford* (s), where an attorney caused a fine to be levied without informing the testator that the effect would be to revoke his will, he, the attorney, being the heir at law. It was very properly held there that the fine revoked the will, but still that it was a case in which the Court of Chancery might properly declare the heir at law a trustee for the devisee who had been defrauded.

For these reasons I am clearly of opinion that in this case the remedy ought to have been by appeal to the Ju-

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dicial Committee of the Privy Council, and not by a bill in the Court of Chancery. I do not go through the authorities, but there is one to which I must refer, because it is the decision of this House, and it is expressly point. That is the case of *Kerrich v. Bransly* (1). In that case there had been a probate granted of a will of personal property; after that there was a bill filed to set aside the probate, but then that bill prayed such other relief as the Court of Chancery might see fit, and praying that the probate might be set aside, it prayed every thing short of that. Lord *Macclesfield* did not set aside the will, but what did he do? he made a decree that the legatee should be declared a trustee for the next of kin; that was clearly the effect of his decision. My Lords, that, I doubt, was a right decision according to the doctrine which is now contended for as regulating the jurisdiction of the Court of Chancery, and it was acquiesced in for some time. But it was at last brought by appeal to this House, and the decree was reversed. An attempt was made to take off from the effect of that authority, by saying that it was not a bill to have the legatee declared trustee for the next of kin, but that it was a bill to set aside the probate altogether. It sought every thing within the compass of that prayer, and it is to be regarded precisely in the same light as if the bill had been simply to have the legatee declared a trustee for the next of kin. Then it was said that that point was not discussed in this House, and that this House must have proceeded upon the merits of the case. I hold the report in my hand, and I will show your Lordships to demonstration that that point was argued in this House, and that that point was decided by this House. Unfortunately we have not got the judgment at length, but we have the arguments which were raised in support of the appeal. In support

(1) 7 Bro. Parl. Cas. 358.

of the appeal it was insisted that the Court of Chancery ought not to have impeached the will of the 18th of *March*, 1715, so far as it concerned the personal estate, because it had been already established by the proper Ecclesiastical Court, which has the sole jurisdiction of determining wills so far as they may relate to personal estate, and if there had been any fraud or imposition in obtaining the will, it was properly examinable in that Court only. Therefore, at your Lordships' bar, in the year 1727, there was exactly the same argument which has been used by the party in this case. On the other side it was argued, "as to the probate of the will in the Ecclesiastical Court it was not impeached by the decree, though the appellant was restrained, as in justice he ought to be, from taking any beneficial interest under it." Now, my Lords, is not that the very argument used in support of the decree of my noble and learned friend, the Master of the Rolls? Because, it is said, you do not impeach the decree of the Ecclesiastical Court granting probate, you only declare that the party who took the benefit of that probate shall be considered a trustee for another. That argument was then urged in this case, but it was urged in vain, because the decree of Lord *Macclesfield* was reversed, and the probate granted by the Ecclesiastical Court stood with all the consequences belonging to it.

I would merely further observe to your Lordships, that I take this distinction; where the Ecclesiastical Court cannot do justice by the powers belonging to it, probate must be granted; it is not a Court of construction, and it must confine itself within its own limits; in certain cases it must grant probate, and refer the parties for justice to a Court of Equity; but if the Ecclesiastical Court in any particular case can do ample justice by granting or refusing a probate, then after the decree of the Ecclesiastical Court there is no remedy in the Court of Chancery; if the Ecclesiastical Court has come to an erroneous decision,

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the appeal ought to have been, formerly, to the Court of Delegates, now to the Judicial Committee. To hold otherwise would lead to most inconvenient consequences; it would lead to a conflict of jurisdiction. Suppose that in this very case there had been an appeal to the Judicial Committee of the Privy Council, as there might have been, the Judicial Committee of the Privy Council might have been put in conflict with this House, they both being Courts of the last resort.

For these reasons I am of opinion that my noble and learned friend who first addressed the House, was quite right in reversing the order of his Lordship, the Master of the Rolls, and that the order appealed from ought to be affirmed.

Appeal dismissed and order affirmed : no costs, the appellant suing as pauper.

The Honourable Henry Trevor	-	<i>Appellant.</i>	1845.
The Honourable George Rice	Rice	} <i>Respondents.</i>	July 8, 14, 15.
Trevor and daughters	-		1847. May 10, 11. July 20.

A testator devised freehold estates to trustees in trust to settle and convey them to the use of *G. R.* for life, with remainder to his issue in tail male, in strict settlement, and in default of such issue the estates to go over. *G. R.* had no son but had several daughters, all born after the testator's death:—

Held that the words “in tail male” were descriptive, not of the issue, but of the interest they were to take, and that the daughters were entitled to take, under the limitation in remainder, as tenants in common.

*Will. Con-
struction.
Issue in tail
male.*

THIS was an appeal from a decree of the Vice Chancellor on the construction of a will of Viscount *Hampden* (a). His Lordship made three distinct wills, by the first of which, dated the 6th of *September*, 1824, he gave his estates in the county of *Sussex* to the Honourable *Henry Brand*, the appellant, for life, or until he should succeed to the Barony of *Dacre*, then enjoyed by his brother; and after his decease or succeeding to that barony, the testator gave the said estates to the appellant's eldest son, *Thomas Brand*, for life, or until he should succeed to the said barony, with remainder to trustees to preserve, &c.; and after his, *Thomas Brand's*, decease or succeeding to the said barony, the testator gave the said estates to his first and other sons successively in tail male, and, in default of such issue, to the appellant, his heirs, and assigns; “Provided that whenever any son of the said *Thomas Brand*, or his issue male, should succeed to the

(a) Reported in 13 Simons, 108.

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said Barony of *Dacre*, then the estate of the person so succeeding thereto (provided that there should then also be in existence any other son or issue male of any other son of *Thomas Brand*) should determine in like manner as if the son of the said *Thomas Brand*, who or whose issue male should then so succeed to the said barony, were not only actually dead, but as if there were also an utter failure or extinction of male issue of such son of *Thomas Brand*, and thereupon the said estates should go over to the next or other son of *Thomas Brand*, or his issue male, to be entitled under the devises aforesaid :” With proviso also to take the name and arms of *Trevor*.

By the second will, dated the 7th of *September*, 1824, the said testator appointed executors, and by a codicil, dated the 8th of *September*, he gave them the residue of his personal estate upon certain trusts therein mentioned.

By the third will, dated the 8th of *September*, 1824, which is the subject of this appeal, the testator gave his estates in the county of *Bedford* to the Hon. *Henry Brand*, and another, and their heirs, upon trust that they “do and shall settle and convey the same to the use of or in trust for the Hon. *George Rice*, son of Lord *Dynevor* (the respondent) for life, without impeachment of waste, except permissive waste or spoliation, with remainder to his issue in tail male in strict settlement, upon condition that all person or persons from time to time to come into possession of the said settled estates do and shall, within one year afterwards, take the name and bear the arms of *Trevor*, and also upon the like condition to that I have made in my will of my *Sussex* estate, so far as the change of circumstances will permit, that the said estate shall go over to the party next entitled on the person for the time being possessed becoming entitled to the Barony of *Dynevor*, and in default of such issue of the said *George Rice*, I devise my said *Bedfordshire* estate unto the said *Henry Brand*, his heirs and assigns for ever.”

The testator directed that in the intended settlement should be contained the usual powers of leasing for *George Rice*, and the trustees to preserve, &c., during the minority of tenants in tail in possession, and also a power for the said *George Rice* to jointure any wife or wives, at one or several times, to the extent of one-fifth part of the then ordinary annual rental of the settled estates; and also a power to portion younger children to a limited extent; and the testator declared it to be his will and intention that, notwithstanding the absolute devise of his *Sussex* estates to *Henry Brand* and his son and issue male, a settlement under the direction of the same trustees should be made of these estates, so as to include such powers, provisions, and clauses, *mutatis mutandis*, as before mentioned, concerning his *Bedfordshire* estates.

The testator died on the 9th of *September*, 1824. Soon after his death, *Henry Brand* (the appellant), and *George Rice* (the respondent), took, respectively, the name and arms of *Trevor*, and the latter is now called *George Rice Rice Trevor*. He had no issue at the time of the testator's death, but he has since had five daughters, and no other child.

The Barony of *Dacre*, mentioned in the first will, is a Barony by writ, descendible to females as well as males. The Barony of *Dynevor*, mentioned in the will of the *Bedfordshire* estates, was created by letters patent, and is limited to heirs male of the body of the first Baron.

In a suit instituted in Chancery, between the respondent as plaintiff, and the appellant and others as defendants—to which suit the respondent's daughters were made parties—an order was made, referring it to the Master to approve of a settlement, in pursuance of the will of the *Bedfordshire* estates.

The Master made his report in 1841, setting forth the

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draft of settlement, of which he approved. The respondent, and his daughters, severally, took various exceptions to the settlement, all concurring in this, that the settlement contained no limitation in favour of daughters. (The settlement, exceptions, and arguments on them, and also the judgments, are set out in 13 Simons, 113, *et seq.*)

The Vice-Chancellor, in his judgment on the principal exceptions held, that, under the limitation to the "issue in tail male," females might take, and he therefore allowed those exceptions, declaring by his order, dated the 27th July, 1842, "that in the draft of settlement approved by the Master there ought—immediately subsequent to the limitation therein contained of the hereditaments therein comprised to the first and other sons of *Geo. R. R. Trevor* successively in tail male, and for default of such issue—to have been inserted a limitation of the said estates to the use of all and every the daughter and daughters of the said *Geo. R. R. Trevor*, as tenants in common in tail male, with cross remainders between them in tail male." The subordinate exceptions also were allowed, some of them with variations; and the report was referred back to the Master to be reviewed.

The appeal was against that order.

Mr. *Wigram* and Mr. *Hodgson* (with whom were Mr. *J. Parker*, and Mr. *C. Hall*) for the appellant:—

The first and principal question in this appeal is, whether, in the settlement to be made of the *Bedfordshire* property, estates are, or are not, to be limited to the daughters of *Geo. R. R. Trevor*? Upon the decision of that question depend the first and third of his exceptions to the draft settlement approved by the Master; the first and third of the exceptions taken by the eldest daughter, and three exceptions taken by the other daughters. The eldest daughter's exceptions differed from those taken by

the younger daughters in this, that while the eldest claimed that in default of sons of *Geo. R. R. Trevor* the property should be limited to his first and other daughters *successively* in tail male, the younger daughters contended that all the daughters should take together as tenants in common; and to that conclusion the Vice Chancellor came.

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There are two other, but subordinate questions: the first of them, raised by the second of *Geo. R. R. Trevor's* exceptions, relates to the extent of his power of jointuring, under the power given to him in the will, "to jointure any wife or wives, at one or several times, to the extent of one-fifth part of the then ordinary rental of the estates;" the second of these minor questions, raised by his fourth exception, relates to the clause shifting the estates upon the party in possession of them succeeding to the Barony of *Dynevor*.

The main question depends upon the meaning of the words "with remainder to his issue in tail male, in strict settlement." The respondents contend that the word "issue" describes the persons who are to take; that the words "in tail male" are merely descriptive of the estates which they are to take, and therefore that the settlement ought to contain limitations to daughters as well as sons. The appellant contends that the words "in tail male" go to form part of the description of the persons who are to take, limiting the estate to *G. Rice*, the first taker, and to the heirs male of his body, and therefore that the settlement ought not to contain limitations to daughters. That was the view taken by the Master, and the object of the appeal is to restore the settlement as approved by him. The grounds on which the appellant submits that the Master was right, and the Vice Chancellor's decree erroneous, are these:—*first*, according to the natural and proper technical

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meaning of the words "issue in tail male," limitations to sons only ought to be inserted in the settlement; *secondly*, looking at the whole will, it appears that the testator plainly contemplated that, there should be always a single successive ownership of the estates, and not a co-ownership among tenants in common, as the Vice Chancellor declared. But upon any reasonable construction of the will, it is impossible to agree with his Honour, that daughters are to be admitted to take estates under a limitation to "issue in tail male."

The phrase "issue in tail" is an expression properly and technically descriptive of "heirs of the body." It is a legal and correct phrase, marking that the word "issue" is used in its proper sense of including remote as well as immediate descendants, and not in any restricted sense, such as that of "children." In like manner the words "issue in tail male" are properly and technically descriptive of "heirs male of the body." The expressions "issue in tail male," and "heirs male of the body," are synonymous; they are stated to have been so used by Lord Camden in *White v. Carter* (a), and by Lord Chancellor Sugden, in noticing that case in *Rochfort v. Fitzmaurice* (b).

It is clear that if this had not been an executory, but an immediate, devise to *G. R.*, and "his issue in tail male," or to *G. R.* for life, and after his decease to "his issue in tail male," *G. R.* would have been tenant in tail male; *Shelley's Case* (c). The words describing the issue to take are the same in the two instances, and they would have received the same construction. The words "in tail male" would, in each instance have formed part of the description of the issue to take. All the cases on the meaning of the word "issue," are collected in Mr. *Prior's* useful *Treatise* (d). The circumstance that the pre-

(a) Amb. 670.

(c) 1 Co. Rep. 93.

(b) 2 Dru. and War. 25.

(d) See ss. 9, 189 and 209.

sent is the case of an executory trust, and not of an immediate devise, can only make a difference in the mode of parcelling out the estate devised; that is, parties who would, under an immediate devise, have taken by descent, might, under an executory trust, be made to take by purchase; but the parties to take are in each case precisely the same. In *Blackburn v. Stables* (d), Sir *W. Grant* says, "there is no difference between an executory trust in marriage articles and in a will, except that the object and purpose of the former furnish an indication of intention, which must be wanting in the latter." "If it is clearly to be ascertained, from any thing in the will, that the testator did not mean to use the expressions, which he has employed, in their strict proper technical sense, the Court in decreeing such settlement as he has directed, will depart from his words in order to execute his intention, but the Court must necessarily follow his words, unless he has himself shown that he did not mean to use them in their proper sense." In an immediate devise, the addition of the words "in strict settlement" would not have made any difference; and here they cannot be taken to mean any thing but to regulate the manner in which the persons designated by "issue in tail male" are to take, so as to preserve the estate to the different members of the family to whom it was destined, and to prevent the first taker from barring the remainder.

It is submitted that this view of the case is alone conclusive in favour of the appellant's construction. It shews that the settlement ought to be made on *Geo. R. R. Trevor* for life, with remainder to his issue, who would take under a limitation in tail male. This construction renders the testator's direction to settle, perfect in itself; at the same time that it clearly defines the issue who are to take, it also defines the manner and order in which they are to take; therefore,

(d) 2 Ves. and B. 269-70.

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no question can arise, upon this construction, as to the proper limitations to be contained in the settlement. But upon the respondents' construction the direction to settle is indefinite and imperfect. Numerous questions may arise as to the objects to take under the description of "issue," and the manner and order in which the issue are to take; events happening after the date of the will might vary the objects to take. Some of the difficulties arising upon the respondents' construction are so great and so obvious, that the omission of any provision in the will applicable to them, renders it impossible to suppose that the testator meant what the respondents contend for. If a solicitor were to send to counsel instructions for a settlement in the words used by this testator, no conveyancer of experience could doubt as to the meaning of an expression so familiar as "issue in tail male in strict settlement;" even a person less conversant with forms would at once conclude that they mean male issue, by considering that, otherwise, the instructions were too indefinite to be acted upon. The first rule of construction is, that if words be susceptible of their ordinary primary meaning—their proper and legal signification—they are to be taken in that proper legal signification, unless it be repugnant to the context. That rule was illustrated in a recent case in the Court of Exchequer, *Mallam v. May* (e).

According to the appellant's construction, the words "issue in tail male" are a description of all the issue who are to take under the limitations, whether by descent or purchase, and the proper sense of the word "issue," as extended to descendants of every degree, is adhered to. But upon the respondents' construction, the word "issue" requires to be confined to children, or to issue in some given degree; for manifestly a direction to settle

(e) 7 Jurist, p. 19.

“on issue in tail male” including all descendants, whether male or female, however remote, would be absurd, and indeed contradictory. The respondents’ construction, therefore, would give a confined meaning to the word “issue,” without anything in the context to warrant it. They contend that the words “in tail male” are words properly descriptive of an estate known in the law; and then, to avoid an absurdity, the word “issue” must be construed “children.” But this argument assumes the point in dispute, that is, it assumes that the words “in tail male” are descriptive only of the estate which the takers are to take. We, on the contrary, say the words are descriptive of the persons who are to take; that is the primary meaning of the words “issue in tail male,” clearly signifying heirs male of the body; *Roe v. Grew* (a) *Wharton v. Gresham* (b), *Haydon v. Wilshire* (c), *Whitelock v. Hedden* (d), *Leigh v. Norbury* (e), *Dalzell v. Welch* (f), *Gallini v. Gallini* (g), *Lees v. Mosley* (h).

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The appellant’s construction is aided by other parts of the testator’s will and codicils:

First. The settlement is directed to be made upon a condition that the estate is to go over to the “party” next entitled, on the “person” for the time being possessed thereof becoming entitled to the Barony of *Dynevor*. The words giving the estate over, contemplate only the case of one party being next entitled. The terms of the condition, therefore, raise an inference against the construction that the estate was to go over to several daughters; and favour the appellant’s construction, that there could be only a single owner,—only one person at a time entitled to the estate.

(a) 2 Wils. 322.

(b) W. Blacks. 1083.

(c) 3 T. Rep. 373.

(d) 1 Bos. & Pul. 243.

(e) 13 Ves. 340.

(f) 2 Sim. 319.

(g) 5 Barn. & Ad. 621.

(h) 1 You. & C. (Exc.) 589.

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Upon the respondents' construction several daughters would take together as tenants in common; and so, according to the Vice Chancellor's decree, they would be all co-owners. It is also to be observed that the Barony of *Dynevor* is a Barony limited to heirs male only. Unless the appellant's construction be adopted, the condition can only be made applicable to some of the persons for the time being possessed of the estate, although, from the language used, it would appear to apply generally to every person for the time being in possession. The condition is not inserted at length in this will. The testator specifies the event in which the estate is to shift, and the person to whom it is to go over, and refers to the condition in the will of the *Sussex* estate as that with which the condition to be inserted in this settlement was to correspond, "so far as the change of circumstances will permit." There is no ground to argue that these words had reference to the difference in the nature of the limitations of the two estates. It is sufficient to say, that under the direction to settle the *Bedfordshire* estate in strict settlement, there might have been several estates for life, with several remainders to first and other sons in tail male of different persons, and the shifting clause in the will of the *Sussex* estate, which was framed so as to provide for a shifting from the issue male of one person only, might therefore require some re-modelling to make it apply to the different state of circumstances.

Secondly. The direction to take the name and arms of *Trevor* also shows that the estate was to be enjoyed by one person. That direction is inapplicable to females. It can hardly be supposed that the testator contemplated several persons in possession, all using the name and bearing the arms at the same time. The object of clauses of this nature, almost necessarily, is confined to the case of a family estate enjoyed by one person. Further, the testator does not provide for the husbands of daughters

taking the name and bearing the arms, a provision which is invariably inserted in similar clauses when females are included; and, further, there is nothing in the will to exempt a daughter who had taken the name, and subsequently married, from a forfeiture consequent upon the change of her name by marriage. The words "all person or persons from time to time to come in possession of the said settled estates," which are used in this condition, do not show that the case of more than one person at a time being in possession was contemplated. The plural, "persons," is rendered necessary by the use of the word "all." The words "from time to time" make the plural, "persons," applicable to a single and successive enjoyment. It is observable that the testator used the plural, "persons," in his codicil, in reference to his *Sussex* estate, which clearly was to be held by one person only at a time. The words of the codicil are, "to allow the persons for the time being entitled."

Thirdly. The testator directed that the settlement shall contain powers of leasing "during the *minority* of tenants in tail in possession," and a power of sale, exchange, partition and enfranchisement, "during the *minority* of *each* tenant in tail in possession." The language here used, points to a single and successive enjoyment. The difficulty of applying these powers to undivided shares, is also in favour of the appellant's construction. There is no provision for the case of some of the persons in possession being infants, and others of age; and the want of such a provision would render it impossible to act under the powers in the case supposed. Leases or sales of undivided shares only, could not have been in contemplation.

Fourthly. In the codicil, the purchase of additional lands is (by reference to the corresponding direction as to the *Sussex* estate) to be made with the consent of the "person" who, for the time being, would be "tenant" for life, in

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possession of the purchased estates; but it is a consequence of the respondents' construction, that there might have been several "persons" who, for the time being would be tenants for life in possession. Upon that construction also, some of the persons in possession at the same time, as tenants in common, might be tenants for life, and others tenants in tail male, to which state of things the direction in question cannot possibly be applied.

Fifthly. The estate is given over "in default of *such* issue of the said *Geo. Rice*." Here the word "issue" is obviously used in the sense attributed by the appellant to the same word in construing the words directing a settlement.

Sixthly. The will of the *Sussex* estate and the will of the *Bedfordshire* estate were executed within two days of each other. The former will is not executory, and contains only limitations to first and other sons in tail male. The latter will directs a strict settlement to be made, and the testator therefore does not describe the issue to take as first and other sons in tail male, but generally as issue in tail male. At the end of the latter will the testator refers to the former will, and declares that though such former will was not executory, he now intends that it should be so, and that the settlement to be made of the *Sussex* estate should "include such powers, provisions, and clauses, *mutatis mutandis*, as herein before mentioned concerning my *Bedfordshire* estate." It is submitted that the provision here made, shows that the character of the limitations of the two estates were to be the same, that is, that both estates were to be settled on male issue only. It cannot be contended that those words have the effect of directing a settlement to be made of the *Sussex* estate on *Thomas Brand* and his "issue in tail male," in the manner in which the respondents construe those words, so as to let in female issue to take the *Sussex* estate.

Upon the respondents' construction there would clearly be no ground for confining the word "issue" to "children." It must at least include all issue who might be living at the testator's death, and then very anomalous results might follow upon that construction; for instance, a daughter of *Geo. R. R. Trevor* might have had a daughter in the testator's lifetime, in which case the grand-daughter would, upon the respondents' construction, have been one of the stock to whom an estate by purchase was to be limited, and her male issue might have inherited; but if such grand-daughter had been born a day after the testator's death, neither she nor her male issue could have taken. Again, the daughter, born in the lifetime of the testator of a daughter, might take, while a daughter, not born at the testator's death, of a son, could not take; and the daughter of a daughter would thus be preferred to the daughter of a son, which would be most capricious. It is impossible for any thing to be more unusual and incongruous than for children, and the children of such children, to take together as tenants in common in tail male. The appellant's construction is free from incongruities and anomalies of that kind.

According to the respondents' construction, the will contains nothing to import any preference of sons to daughters or of daughters to sons, or sons *inter se*. The Court below expressed its opinion, that the words "in strict settlement" are to be referred only to the mode in which the tenant for life, *Geo. R. R. Trevor*, and his issue, should take. These words do not describe what issue are to take, but merely express that the issue shall take by purchase. The inevitable consequence would appear to be, that upon the respondents' construction, all the issue (sons, daughters, and remoter issue) must take together as one class, as tenants in common, in tail male. Yet it is certain, and is indeed agreed, that a preference as between sons, and as between sons and daughters,

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must have been intended, and that the settlement must be framed accordingly. It is impossible, therefore, to adhere to the words used by the testator, if the respondents' construction be adopted.

The result of their construction would be to create limitations to the daughters as tenants in common in tail male. This was so decided by the Court below, and it is an inevitable result, for it is certain there is nothing in the will to give a preference to daughters *inter se*; such a mode of limitation is without precedent. In practice, limitations in settlements to daughters as tenants in common, are always in tail general. The result of the limitations is against the probable intention of the testator. In practice, where females are not excluded, the daughters of a son are always preferred to his sisters, and accordingly, where there is a limitation to daughters as tenants in common, it follows a limitation to sons in tail general, under which female descendants of the sons would take. It is admitted that the testator did not intend any female descendant of *Geo. R. R. Trevor* to take by descent, and it attributes a capricious intention to the testator to hold that he intended they might take by purchase.

This being the case of an executory trust, the proper mode of construing the words "issue in tail male," is to read them as referring to those limitations which a conveyancer of experience would insert in a settlement, if he was furnished with instructions in the words of the will in question. It is here again submitted, with great confidence, that any conveyancer of experience would, with such instructions, without hesitation frame the settlement in accordance with the appellant's construction.

[Upon the two subordinate questions, first, as to the power of jointuring, the learned counsel submitted that, according to the true construction of the will, *Geo. R. R. Trevor* should not be authorized to appoint by way of jointure, a clear yearly sum equal to one-fifth part of

the rental of the estates, without any deduction, but that the yearly sum appointed ought to be subject to the land tax; in other words, that the outgoings should be taken out of the gross rental, before the division took place, to ascertain the amount of the jointure; and, secondly, as to the shifting clause, they submitted that the estate of the person becoming entitled to the Barony of *Dynevor*, ought to be made to cease, whether there should or should not be in existence (applying the condition to *Geo. R. R. Trevor* himself) any child, or any issue male of any child, or (applying it to any of his children or their issue male) any other child, or any issue male of any other child, capable of taking under the limitations of the settlement. These questions were deemed to be of very little importance in comparison with the first, the decision of which must also govern the construction of the second of these two clauses of the will.]

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Mr. *Bethell* and Mr. *Romilly* (with whom was Mr. *Wickens*) for the respondents :

It must not be forgotten that the question raised by the exceptions is, how the settlement of the estates is to be framed so as effectuate the testator's intention. It is, in the first place, to be a strict settlement embracing Mr. *Rice Trevor* and his issue, and giving to the issue estates in tail male; and then comes the question, whether his daughters are to be excluded from participation in the estates.

The word "issue," used by the testator in describing the persons whom he meant to take the estates as purchasers, must be taken according to its ordinary acceptance, as including both males and females; *Hart v. Middlehurst* (f). Are you warranted by the language of the will, by decision, or by principle, in saying

(f) 3 Atk. 371. See other cases, *ante*, p. 247.



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that the daughters are to be excluded from the settlement on the "issue?" The words "in tail male" do not operate to exclude daughters. No legitimate inference can be drawn from the quantity of interest conferred, to show that the class of persons previously named to take is less extensive than the words import. The word "issue" contains the description of the persons who are to enjoy; the words "in tail male" are indicative of the quantity of interest they are to enjoy. The adjective "male" is not to be separated from the word "tail" and joined to "issue." The phrases "tenants in tail male" and "in tail special" are familiar to all, as laid down in *Littleton's Tenures*. The issue of *Rice Trevor* are to be the tenants of the estates to be comprised in the settlement. What interest are they to take? They are to take just the quantity of interest designated by the words "in tail male;" words apt and proper, and used in their plain and ordinary meaning. Let "children" be substituted for "issue," and there will be no difficulty in the construction of the limitation.

The question will be facilitated by attending to the rules of construction as stated in *Jarman's Edition of Powell on Devises* (g): "Words in general are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, and they are in all cases to receive a construction which will give them all effect, rather than one that will render some of them inoperative: and of two modes of construction, that is to be preferred which will prevent a total intestacy." "Where a testator uses technical words, he will be presumed to employ them in their legal sense, unless the context contain a clear indication to the contrary." "Words occurring more than once in a will shall be presumed to be used always in the same sense, unless a contrary intention

(g) Vol. II., p. 8. Rules 14, 15, and 16.

appear by the context, or unless the words be applied to a different subject. And upon the same principle, where a testator uses an additional word or phrase, he shall be presumed to have an additional meaning."

Let these principles be applied to the interpretation of these wills. It will be seen that in the will of the *Sussex* estates, an immediate devise to males only, the word "issue" occurs seven times, but never without the adjunct "male;" whereas in the will now under consideration, the testator uses the word "issue" only, thereby indicating that, in its proper technical sense, it comprehends females as well as males; but in the other will, where he meant to exclude females, he uses the proper adjunct. The context of the two testamentary instruments shews that the testator, if he had designed to exclude the daughters of *Rice Trevor*, knew how to use apt words for that purpose; and therefore, in the absence of such words, we cannot come to the conclusion that he had any such intention. The use of the words "person or persons," in the name and arms clause in the will now under consideration, shows that the testator there contemplated the possibility of his *Bedfordshire* estates being held by a plurality of persons, as females, tenants in common; but he carefully uses the singular number in the clause shifting the estates, on the person in possession of them succeeding to the Barony of *Dynevor*, which could be held only by one person, and a male. Again, "in default of such issue," he devised the estates over. There he does not use the words "male issue" or "issue male," which would exclude females, but the words "such issue," "such" relating to its antecedent "issue," capable of admitting females as well as males. In the last clause, declaring it to be his will that "notwithstanding the absolute devise of his *Sussex* estate in favour of *Henry Brand*, and his issue male," there should be a settlement of that estate, he uses the adjunct, "male," marking again the distinction he

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made in the limitations of the two estates, the difference of expression manifesting the difference of purpose.

Much of the argument for the appellant has proceeded on the assumption, first, that "issue in tail male" are synonymous and identical with "heirs male of the body;" and, secondly, that the devise is to be considered as if it was an immediate devise to Mr. *Rice Trevor*, with remainder to his issue in tail male,—under which undoubtedly the first taker would have an estate in tail; *Archer's Case* (a), *Wild's Case* (b) *King v. Melling* (c). For the first part of that argument reference was made to *White v. Carter* (d), a case which, on examination, will be found to be no authority, and is besides incorrectly reported; and as to the second, the devise in this case is not to be confounded with a devise to a man and his issue in tail male which are words of limitation, and not of purchase—which all parties admit to have been here intended—and it is an established rule that where the word "issue" is used in an instrument as a word of purchase, it cannot, at the same time, be taken as a word of limitation; *Roe dem. Dodson v. Grew* (e), *Cook v. Cook* (f), *Doe dem. Cooper v. Collis* (g). The word "issue," here taken as a word of purchase, without anything in the context to controul its meaning, comprehends equally male and female; *Hart v. Middlehurst* (h), *Dod v. Dod* (i), *Oddie v. Woodford* (k). (And see the cases, *supra*, p. 247.)

The clause in the will consists of three distinct parts, first, "issue," which is used as a word of purchase, and has the appropriate purpose of pointing out the descendants, male and female, who are to take; secondly, "in tail male," which words describe the nature and quality of the estates

(a) 1 Co. Rep. 66.

(b) 6 Co. Rep. 17 b.

(c) 1 Ventris, 229.

(d) Eden, 366; Amb. 670.

(e) 2 Wils. 322.

(f) 2 Vern. 545.

(g) 4 Term Rep. 244.

(h) 3 Atk. 371.

(i) Amb. 244.

(k) 3 Myl. & C. 600-10-13.

to be taken ; and, thirdly, “ in strict settlement,” which— inasmuch as “ issue” is *nomen collectivum*—have the office of pointing out the series and form of arrangement in which the issue, males and females, are to take. How a settlement in that form is to be carried into effect, is best shewn by the practice of conveyancers, and by writers of authority on the subject. Mr. *Fonblanque*, in his *Treatise on Equity*, speaking of the general principles of the Court in respect to settlements, as in the case of marriage articles, says (*l*), “ And if the parties come into a Court of Equity for a specific execution, the Court will provide, not only for the sons of the marriage by proper limitations, but likewise for the daughters ; and even although a settlement were actually made in pursuance of such articles before marriage, equity will rectify it in favour of the issue female.” *Gilbert’s Lex Prætoria*, published about 1750, has this passage (*m*) : “ If articles be made between husband and wife, &c., in which the limitations are to the husband for life, remainder to the wife for life, remainder to the heirs of the body, &c., there if they come to a Court of Equity for specific execution, &c., the Court will provide, not only for the sons of the marriage by proper limitations, but also for the daughters.” So that under the expression “ heirs of the body,” though not so comprehensive as “ issue,” daughters are comprehended. Passages to the same effect occur in *Atherley’s Treatise on Marriage Settlements* (*n*), *Butler’s Notes to Co. Litt.* (*o*), and *Preston on Estates* (*p*). The formula of strict settlement is given in the Books of Precedents, as in *Horsman’s Precedents* (*q*), the limitations are to first and other sons of the marriage, in tail male, “ remainder to daughters as tenants in common in tail.” In *Barton’s Convey-*

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(*l*) Vol. i. p. 405 (5th edit.)

(*o*) Page 376 *b*.

(*m*) Page 253.

(*p*) Page 131.

(*n*) Page 101.

(*q*) Page 629 (2nd edit.)

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ancing (*r*) the form is given in full, and it is said in a note "the usual plan (of strict settlement) is to limit the estate" (after estates for life to husband, and then to the wife, with remainder to trustees to preserve, &c., interposed) "remainder to the first and other sons in tail, remainder to daughters as tenants in common, with cross remainders between them." Another note to the precedent states, that, "in settlements of large estates, they are sometimes limited, on failure of male issue of sons, to daughters in strict settlement in tail male" (*s*).

In *Stewart's Practice of Conveyancing* (*t*) the *formula* for strict settlement gives limitations to the sons successively in tail male or general, "to the daughters as tenants in common in tail male." In *Shelley's* settlement—one of the first precedents put by conveyancers into the hands of their pupils to copy—the limitations are to sons in tail male, to sons in tail general, to daughters as tenants in common in tail general, with cross remainders. The form in *Shepherd's Precedent of precedents* is to the same effect. Mr. *Hayes'* form (*u*) gives the limitations in strict settlement to sons in tail male, then to daughters in tail male, then to sons in tail general, &c. And in *Martin's Conveyancing* (*v*), under the head "Strict Settlements," the limitations are to the first and other sons successively, first in tail male, then in tail general; first and other daughters successively, first in tail male, then in tail general. Mr. *Jarman's* Precedents are precisely to the same effect. It is most important, if not imperative, on the Courts to attend to the meaning which practical men in any department of the law put on the language which they are constantly in the habit of using; the manner in which they use and act upon particular words in the instruments which they prepare, gives the best illustration of their meaning.

(*r*) Vol. vii. p. 281 (1824).

(*u*) 2 Vol. 54.

(*s*) *Id.*, page 312.

(*v*) Vol. iv., p. 609, ed. 1844;

(*t*) Vol. ii. (ed. 1832.)

by Davidson.

Lords *Eldon* and *Redesdale*, in numerous cases, expressed great respect for their practice, emphatically in *Smith v. Earl of Jersey* (*w*), and in *Cholmondely v. Clinton* (*x*).

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[In refutation of the argument of the appellants, that "issue in tail male" was identical with heirs male of the body, they cited *Seale v. Seale* (*y*), the observations of Sir *W. Grant* in *Blackburn v. Stables* (*z*), and Lord *Eldon* in *Jervoise v. Duke of Northumberland* (*a*).

As to the power of jointuring, they contended that the Vice Chancellor put the true construction on it; and the intention of the testator was that Mr. *Rice Trevor* should have power to appoint, by way of jointure, a clear annual sum to the amount of one fifth part of the gross annual rental of the estate at the time of making the settlement. The words in the will are "the ordinary annual rental of the estate."

And as to the clause for shifting the estates, on the succession of the person in possession, to the barony of *Dynvor*, they submitted that, according to the true construction of that part of the will which incorporates in it by reference the like clause in the will of the *Sussex* estate, the *Bedfordshire* estates ought not to be made to shift from a child or the issue of a child of *Rice Trevor*, unless there should then also be in existence some other child, or issue male of some other child of *Rice Trevor*, capable of taking the settled estates under the limitations of the settlement.]

Mr. *Wigram*, in reply, claimed the benefit of the canons of construction read by Mr. *Bethell* from Mr. *Jarman's* Book (*b*), and desired that they might be applied to the in-

(*w*) 3 Bligh, 444.

(*x*) 4 Bligh, 56.

(*y*) 1 P. Wms. 290.

(*z*) 2 Ves. & B. 370-1.

(*a*) 1 Jac. & W. 570-4.

(*b*) *Ante*, p. 254.

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terpretation of the disputed words, "issue in tail male." The question was narrowed in the cause to the meaning of these words; the appellants contending that they are all descriptive of persons, as distinguished from the estates they are to take, while the respondents contend that the word "issue" is descriptive of persons, the others "in tail male" designating the nature of the estates they are to take under the settlement. If the appellants are right in saying these words merely describe the line of persons who are to take, and are synonymous with the more technical words "heirs male of the body," the whole of the argument for the respondents fails. The appellants do not admit that issue, as used here, is a word of purchase; whether it is a word of purchase or of limitation was not a distinction in the contemplation of the testator. He directed a strict settlement to be made on a line of persons, and it is not till the settlement is to be made that it can be determined who takes by purchase and who by limitation. He referred to the cases that were cited in the argument for the respondents, and submitted that most of them supported his construction, and others of them had no application. He entirely concurred in the proposition, and in the inferences from those cases that were cited to show that in executory trusts for "issue," that term by itself included all descendants, female as well as male.

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The order in which the counsel were heard was this: Mr. *L. Wigram* first, Mr. *Hodgson*, on the same side, was stopped by the Lord Chancellor, saying that their Lordships thought they had heard enough on that side, and that Mr. *Hodgson* would, if necessary, be heard in reply. Mr. *Bethell* was then heard for the respondents, and after him, instead of Mr. *Romilly*, who was with him, their Lordships called on Mr. *Hodgson*, and after him Mr. *Romilly* was heard, and then Mr. *Wigram* in reply.

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The case stood over for consideration until the end of the session of 1846, when the learned Lords, who heard the argument in 1845, viz., the Lord *Chancellor*, Lord *Brougham*, Lord *Cottenham*, and Lord *Campbell*, thought they ought to have the opinion of the common law judges, and the case was ordered to be argued before them, by one counsel on each side, in the then ensuing session.

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The appeal came on now to be re-argued by Mr. *L. Wigram* for the appellant, and Mr. *Bethell* for the respondents, before the Lord *Chancellor* (Lord *Cottenham*), Lord *Lyndhurst*, Lord *Brougham*, Lord *Langdale*, and Lord *Campbell*; in the presence of Lord Chief Justice *Wilde*, Justices *Patteson*, *Coleridge*, *Coltman*, *Maule*, *Wightman*, *Cresswell*, *Erle*, and *Williams*, and Barons *Parke*, *Alderson*, *Rolfe*, and *Platt*.

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The points of the arguments on this occasion, and some few new cases and authorities cited, are incorporated in the preceding summary of the more diffuse arguments at the former hearing.

The Lord *Chancellor* proposed the following question to the learned Judges, and, at their request, time was given to them to consider their answer :—

“ *George Rice Rice Trevor* died, leaving no son, but leaving one daughter, who had a son who attained twenty-one. The mother and son having agreed to sell the *Bedfordshire* estates to A. B., and to make a good title thereto, have brought an action against A. B. upon the agreement; the question is, whether they can, with the concurrence of the trustees, make a good title to these estates?”

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Lord Chief Justice *Wilde*.—The question proposed by your Lordships has reference to a statement to the effect that “ *George Rice Rice Trevor* died leaving no son, but leaving one daughter who had a son who attained twenty-

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one; and that the mother and son have agreed to sell the *Bedfordshire* estates to A. B., and to make a good title thereto, and have brought an action against A. B. upon their agreement." And the question proposed by your Lordships is, "whether the only daughter of *Geo. R. R. Trevor*, and her son, can, with the concurrence of the trustees, make a good title to those estates?"

In answer to that question I have to state, that it is the unanimous opinion of the judges who heard the argument at your Lordships' bar, that a good title can be made, by the parties mentioned in the question, to the estates therein referred to.

The answer to the question depends upon the construction of the devise of the *Bedfordshire* estates, contained in the will of Lord *Hampden*, which devise is expressed in the following words: "I give and devise unto General the Honourable *Henry Brand* (meaning the appellant) and *Joseph Rogers*, gentleman, and their heirs, all and every my real estates in the county of *Bedford*, whether freehold or copyhold, upon trust, that they or the survivor of them, or his heirs, do and shall settle and convey the same to the use of or in trust for the Honourable *George Rice*, son of Lord *Dynevor* (now the respondent *Geo. R. R. Trevor*) for life, without impeachment of waste, except permissive waste or spoliation, with remainder to his issue in tail male, in strict settlement, upon condition that all person or persons from time to time to come into possession of the said settled estates do and shall, within one year afterwards, take the name and bear the arms of *Trevor*: And also, upon the like condition to that I have made in my will of my *Sussex* estate, so far as the change of circumstances will permit, that the said estate shall go over to the party next entitled, on the person for the time being possessed becoming entitled to the Barony of *Dynevor*; and in default of such issue of the said *George*

*Rice*, I devise my said *Bedfordshire* estate unto the said *Henry Brand*, his heirs and assigns for ever."

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The question upon this devise is, whether, under either the word "issue" or the words "issue in tail male," sons only are comprised, or whether daughters as well as sons were intended to take?

The trusts in the will being executory, it is clear that *Geo. R. R. Trevor* was not entitled to more than a life estate, and that his issue, whether males only, or males and females, were to take by way of remainder as purchasers. It is not controverted that the word "issue," in its ordinary and proper sense, includes all descendants, however remote, and includes females as well as males. That such is the proper construction of that word is too well established to render it necessary to refer to authorities upon the subject. In this will, therefore, "issue," as a word of purchase, is synonymous with "children." But it is contended on the part of the appellant that the word "issue" in this will cannot be in any manner severed in construction from the words "in tail male" which follow it; and that the words "issue in tail male" must be considered as one entire and indivisible expression, describing the first takers and the estate to be taken; and, consequently, that the parties thereby designated as the first purchasers are the issue male, or sons of *Geo. R. R. Trevor*, to the exclusion of the daughters.

The respondents contend that the word "issue" is used in its natural and admitted ordinary sense, including females, and that such sense is not varied, or in any respect affected by the words "in tail male:" that the word "issue" expresses the parties to take, and the words "in tail male" the estate to be taken.

It seems to be agreed that the construction of the devise, as to the point submitted to the judges, is not

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affected by the words “in strict settlement ;” and we think that it is not.

The devise, if read in the manner contended for by the appellant, must be deemed to be framed in a very untechnical and inaccurate manner. The issue are to take as purchasers, and the word “issue” is a proper and apt word to describe those who are so to take ; but “issue in tail male” is not an usual or apt form of expression to describe the first taker of an estate tail. “Issue in tail male” is an expression only correct when used in reference to an estate already settled ; “issue in tail male” being the ordinary and correct form of expression to describe one taking by descent under an estate tail vested in the ancestor ; and the words “issue in tail” are used in this sense, and as contrasted with the ancestor or first taker, by Lord *Coke* in the passages which have been referred to, and in the text books (*b*).

The question in this case seems to be narrowed to the point, whether in construing this devise the word “issue” is to be read in its ordinary sense, as including females as well as males ; or whether, by the addition of the words “in tail male” in immediate connexion with the word “issue,” or from other parts of the will, it is manifested that the word “issue” was not used in such ordinary and usual sense, but in a restricted and limited sense, as including males only.

It cannot be necessary to cite any of the numerous determinations in which the rule of construction has been recognized in the Courts of Law and Equity, and affirmed by your Lordships’ house—that in a will, words, whether technical or otherwise, are to be understood as used in the sense ordinarily and properly applied to them, unless, from

(*b*) Litt. s. 638—642 ; Co. Litt. 326 *b*, 327 *a*, 327 *b*.

he whole context of the will, it shall appear satisfactorily and clearly that the words to be construed have been used, and were intended to be understood, in some other sense.

We are of opinion that the word "issue" was used in the present will in its ordinary sense, and comprised females as well as males, and that such meaning is not controlled or affected by the words "in tail male" which immediately follow the word "issue," or by any other part of the will.

The words "issue in tail male" were a convenient and not incorrect form of expression to denote the first purchasers, and the estate to be taken; the takers by the word "issue;" the estate to be taken by the words "in tail male." There is no reason against an estate "in tail male" being limited to a female, or an estate in tail female to a male, and the limitation of an estate tail of one kind or the other has no necessary effect in denoting the sex of the first taker, the effect of the words of such limitation not being to describe the first taker, but simply to mark the course of descent from such first taker. If the word "issue" may be correctly construed as describing the first purchasers, and the words "in tail male" be a correct legal description of the estate to be taken by such purchasers, there should be found some very distinct and substantial reason for so construing the entire expression, as to render it an incorrect form of devise.

Therefore, as an estate in tail male may be limited to a daughter as well as to a son, and as daughters come within the description of issue, there seems no good reason, according to the ordinary rules of construction, for deeming this devise ambiguous.

The argument on the part of the appellant, to prove that the devise in question ought to be read as including males

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only, has been mainly derived from other parts of the will and especially from those parts which refer to the disposition and limitations relating to the *Sussex* estates contained in the first will, and in showing that the testator has limited those estates to males only, and from thence inferring that the testator intended to limit the *Bedfordshire* estates also to males only.

We think it would be dangerous, and lead to a great uncertainty in construing a devise relating to one estate to infer an intention not expressed in it, from the intention apparent in regard to a totally independent estate and devised in terms altogether different; but we see ground for inferring an identity of intention on the part of the testator in regard to the two estates. Indeed it appears that the first will is distinctly, aptly, and correctly framed to effectuate the intention of limiting the *Sussex* estates to descendants through males only, the reference to the terms of that will appears to the judges to afford arguments rather opposed to the appellant's construction of the devise in question than in support of it.

The numerous and important authorities regarding the true rules of construction of wills, determine that a departure from the ordinary meaning of the words contained in them should only be adopted from necessity and cases where the context or other parts of the will satisfactorily manifest that the language of the will has been used in some other than such ordinary sense: Adopting the principles of those decisions, many of which have received the sanction of this House, the judges are unanimously of the opinion I have before expressed, namely that the only daughter of *George Rice Rice Trevor*, and her son, mentioned in the statement, can, with the concurrence of the trustees, make a good title to the *Bedfordshire* estates.

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Lord *Brougham*.—My Lords, we have had the benefit of two arguments upon this important case ; first, in the session of 1845, by two counsel on a side, as usual. It then stood over in order that, in consequence of some doubts entertained in the course of that argument, we might have the benefit of the attendance of the learned judges. It was further argued this session, by one counsel on a side, before those learned judges, and we have now the inestimable advantage of their aid in the learned opinion which they have, with one voice, given upon the point submitted to them. (His Lordship read the question). That was the only point, and it turned upon the construction which was to be put upon the words of the devise, “with remainder to his issue in tail male in strict settlement, upon condition,” &c., “and in default of such issue of the said *George Rice*,” &c.

The question is, what is the construction to be put upon those subsequent words, “such issue,” connected with the preceding words “issue in tail male in strict settlement?” —“such issue” would, no doubt, be such issue “as your Lordships should be of opinion were meant by “issue in tail male in strict settlement.”

There is no doubt of the principle of construction which the learned judges have adopted, and which requires no authority: for it rests upon sound sense as well as upon precedent, and it requires nothing else to support it. There is no doubt, that upon sound principle, you are to take words, especially in a will, in their ordinary sense, unless something in the whole context of the will shall be found to displace that ordinary sense, and to require you, for the purpose of effecting the general intention of the testator to give an extraordinary and special construction to the words, and take them out of their ordinary acceptation. As to the word “issue,” the question is, whether the addition of the words “in tail male in strict settle-

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ment" makes it a limitation and restriction to issue male, the word "issue" having in it no one tittle of limitation or restriction to males, but being a general word applicable to all issue, female as well as male.

I can easily understand how, if the word "male" had been there, it would have been argued, and most forcibly argued, that "issue male" meant only issue male, to the exclusion of females. But "issue in tail male in strict settlement" is a totally different thing; even if "strict settlement" were not there, "issue in tail male" is something perfectly different. The words "tail male," do not apply to issue, they are not words restricting the issue; they are words describing the estate taken by that issue. Consequently "issue in tail male" is, as the learned judges observed, a convenient and not incorrect form of expression to denote the first purchasers and the estate to be taken, the word "issue" designating the first purchasers, and the phrase "tail male," to which is added "in strict settlement," being a description of the estate taken by those purchasers.

Therefore, I hold the opinion at which the learned judges have arrived, that as an estate in tail male may be limited to a daughter as well as a son, and as daughters come within the description of "issue," there is no reason for deviating from the ordinary rule of construction. The consequence will be, that the question being answered by the learned judges in the affirmative, "that the only daughter of *George Rice Rice Trevor*, and her son *can*, with the concurrence of the trustees, make a good title to these estates," it will follow that the judgment proceeding upon that construction—and which is involved in the question so put and so answered by the learned judges—ought to stand, and that your Lordships ought to affirm the judgment of the Court below, to which I humbly move your Lordships.

It is, of course, not a case in which we ought to give costs.

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Lord *Lyndhurst*.—It is scarcely necessary to add anything to what my noble and learned friend has stated. The only question is, after *George Rice Rice Trevor's* estate for life, what is meant by “remainder to his issue in tail male?” The word “issue,” in ordinary acceptation, as my noble and learned friend has very properly said, comprises females as well as males, daughters as well as sons : is there anything in this will to limit it to issue male?—I find nothing whatever. That which was relied upon—the phrase to which my noble and learned friend referred—“in tail male” does not at all affect the question, because females may take in tail male as well as males. I agree with my noble and learned friend, that “issue” points to the purchasers who are to take in the first instance, and that “in tail male” is the description of the estate. That is exactly the judgment that was pronounced by the Vice Chancellor, and it corresponds with the opinion which was expressed by the learned judges. Upon these grounds I think that that part of the judgment of the Court below must be affirmed.

There are two or three other exceptions which have been raised in this case ; but the only doubt that could possibly arise related to the point to which my noble and learned friend has addressed his attention. Therefore, being of opinion with my noble and learned friend that the judgment on that point was right, I advise your Lordships generally to affirm the judgment of the Vice Chancellor, and I have authority to state that that is the opinion of the Lord *Chancellor*, who is prevented from being here by circumstances which oblige him to attend the Court of Chancery.



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*Lord Campbell.*—I concur in the opinion of the learned judges. It seems to me to be a clear case. A number of authorities were cited in the argument, but I do not think that, on either side, they much assist us. The words of the will ought to have the natural and legal meaning and effect, unless there be something in subsequent parts of it which renders it inconsistent that that effect should be given to them.

We have the words “remainder to his issue.” I pause there. If I were punctuating this will, I should there put a semi-colon. Then there being “remainder to his issue,” which of course would enable us to ascertain who are to take—next comes the quality of the estate which they are to take; they are to take “in tail male.” Females may take in tail male as well as males. Then as to the words “in strict settlement,” it appears to me that the effect of those words is rather to confirm the opinion which I form on the previous words, that females might be included, because generally speaking where you settle an estate in strict settlement, after the estates given to the sons, the daughters would generally take, therefore, I hold that the words in the will do not go in the slightest degree to restrain, or limit, or affect, the natural interpretation which is always given to the words “issue in tail male.”

*Lord Lyndhurst.*—I wish to add that during the argument considerable stress was laid upon the devise of the *Sussex* estate. I agree entirely in the opinion of the learned judges, that it would be of very dangerous consequence if we were to introduce any circumstances out of the disposition of that estate, for the purpose of governing the construction of this particular and distinct devise. I also concur in the opinion which they have expressed, that if you refer to the devise of the *Sussex* estate, it does

not in the slightest degree tend to vary the opinion which I should have formed merely from the disposition of the estate which is now in question.

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**Mr. Wigram.**—There is a large fund standing to the credit of the *Bedfordshire* estate, and I do not understand that the respondents ask to have the judgment affirmed with costs.

**Lord Lyndhurst.**—In a question of this sort it should be without costs.

**Lord Brougham.**—I have said so.

The decree was then affirmed, without costs.

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 Feb. 9, 10, 16, GESSES OF GLOUCESTER - } *Appellants.*  
 17, 23, 24.  
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 March 10. JACOB OSBORN AND JOHN S. SURMAN, *Respondents.*  
 June 28.  
 July 21.

*Will. Miss-  
 ing codicil.  
 Uncertainty.*

A testator gave to his executors beneficially, in equal proportions, all his property, which he might not dispose of, subject to his debts and any bequests which he might afterwards make. He afterwards made a codicil in these words, "In a codicil to my will I gave to the corporation of *Gloucester* £140,000. In this I wish my executors would give £60,000 more to them, for the same purpose as I have before named. I would also give my friends" (several were named, with large legacies), "and I confirm all other bequests, and give the rest of my property to the executors for their own interest." No other codicil was produced.

Held (affirming a decree of the Court of Chancery on a bill filed by the Corporation of *Gloucester* claiming the two legacies), that the purpose of both the legacies must be held to be the same, and that both failed for uncertainty of the purpose.

JAMES WOOD, of the City of *Gloucester*, banker, died in April, 1836, seised of considerable freehold estates, and possessed of a very large personal estate, estimated at about 800,000*l.*

In December 1841, the Prerogative Court of *Canterbury*, after much litigation there (*a*), and before the Judicial Committee of the Privy Council upon appeal (*b*), granted probate of the three following testamentary papers to Sir *Matthew Wood*, *Jacob Osborn*, and *John S. Surman*, the surviving executors named in the first:

(A) "Instructions for the will of me, *James Wood*, esq., of *Gloucester*. I request my friends Alderman, *Wood*, of

(*a*) 2 Curtis, 82.

(*b*) 2 Moore's Priv. C. Cas. 355.

London, M.P., *John Chadborn*, of Gloucester, *Jacob Chadborn*, of Gloucester, and *John S. Surman*, of Gloucester, to be my executors, and I appoint them executors accordingly; and I desire that they will take possession and retain to themselves all my ready monies, securities, and personal estate, subject to the payment of my just debts, and such legacies as I may hereafter direct; and with respect to my real estate, I shall dispose of the same in such persons and in such parts as I shall by any writing endorsed herein direct. Witness my hand this 2nd December, 1834.—*JAMES WOOD*."

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(B) "I, *James Wood*, esq., do declare this to be my will in disposing of my estates as directed by my instructions:—I declare my wish that my executors shall have all my property which I may not dispose of, and that all my estates, real and personal, shall go amongst them and their heirs in equal proportions, subject to my debts and to any legacies or bequests of any part thereof, if any, which I may hereafter make. In witness whereof I have to this my last will set my hand, this 3rd December, 1834.  
(Signed, in presence of three witnesses), *JAMES WOOD*."

(C) "In a codicil to my will I gave to the Corporation of Gloucester 140,000*l*. In this I wish my executors should give 60,000*l*. more to them for the same purpose as I have before named. I would also give to my friends *Mr. Phillpotts* 50,000*l*. and *Mr. George Council* 10,000*l*." Four others were then named with large legacies, amounting together to 54,000*l*.] "And I confirm all other bequests, and give the rest of my property to the executors for their own interest.—*JAMES WOOD*.  
"Gloucester City, Old Bank, *July* 1835."

The papers (A) and (B) were propounded by the executors, and paper (C) by some of the legatees therein named.

Upon probate of these papers being granted, the appel-

1846.      lants filed a bill in the Court of Chancery against the  
 {      executors, for payment of the two sums of 140,000*l.* and  
 The      60,000*l.* The bill was afterwards amended, and the Attor-  
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Sir *Matthew Wood*, by his answer, said that several testamentary papers alleged to have been signed by the testator before *December 1834*, were referred to in the suit in the Prerogative Court, but no testamentary paper of his was found in his house after his death, save the said papers (A) and (B), and another paper writing made in 1834, expressive of his wish that *John Chadborn* should have the custody of his deeds and management of his affairs. And defendant stated that to the best of his knowledge and belief the testator did not in 1885, or at any time, make or sign the codicil (C), or any such codicil as was there referred to; and if he ever gave such legacies as there mentioned to the Corporation of *Gloucester*, the purpose for which they were given could not be ascertained, and they were therefore void.

The answers of the respondents, *Osborn* and *Surman*, were to the same purport and effect, with this addition in *Surman's*, that even if paper (C) should be held to be valid—which he submitted to the judgment of the Court—yet the legacy of 140,000*l.* must be deemed to be revoked by revocation of the alleged codicil referred to in paper (C) by the testator, which revocation defendant submitted, must be presumed from the circumstance of such alleged codicil not being discovered since the testator's death. And this defendant insisted further, that assuming that no such revocation had taken place, or could be presumed, then the two alleged legacies were void for uncertainty.

The *Attorney General* answered that he was a stranger to the matters stated in the bill, and he claimed, on behalf of charities generally, all such rights as he might be found entitled to.

Vice Chancellor Sir *J. Wigram* heard the cause in *July* 1843, and in the *November* following gave his judgment, ordering the bill to be dismissed, without costs ; and refusing to declare that such dismissal should be without prejudice to the appellants filing another bill for the said legacies (*a*).

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The appeal was against that order.

Sir *Thomas Wilde* and Mr. *Swanston* (Mr. *James Wilde* was with them) for the appellants :

The question for decision arises on the codicil (paper C). The original bill alleged a prior codicil, but the defendants having, in their answers, denied the existence of it, that allegation was struck out by amendment, and the claim to the two legacies now rests on this codicil alone. But although the missing codicil was so withdrawn from the consideration of the Court, the Vice Chancellor founded his judgment on its absence, declaring that without it he could not ascertain what the purpose was for which the legacies were given. And his Honour, without directing any enquiry as to the existence of that codicil, dismissed the bill, and refused to declare that the dismissal was without prejudice to the appellants' right to file a new bill, by which the circumstances in evidence before the Court of Probate, in reference to the missing codicil, might be brought before the Court. Under these circumstances it was now submitted to their Lordships, that they would find enough in the papers before them to justify them in holding the appellants entitled to the legacies, or, if not, that they would direct an enquiry as to the missing codicil by declaring the appellants entitled to file another bill for that purpose.

The Vice Chancellor's judgment proceeded on an erroneous principle ; he ought to have confined his view to the papers proved in the cause, and construed them with-

(*a*) See the judgment, 3 Hare, 136.

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out any reference to another paper, which was not proved or propounded.—

[The Lord *Chancellor*.—That proposition is too broad. Suppose a testator, by his will, gave 1,000*l.* for a purpose mentioned in his marriage settlement. That settlement, of course, is not admitted to probate, but the judge, in construing the will, is bound to refer to it to ascertain the purpose for which the legacy is given.]

Then, if reference to the missing codicil was necessary, it was the duty of the judge to direct an issue or inquiry, as asked by the appellants, relative to the testator's testamentary papers, and the executors' dealings with them, in order that the facts might be ascertained, and the proper legal conclusions drawn from them in respect of the existence or non-existence of the missing codicil, and its custody and non-production. The Vice Chancellor, instead of directing such inquiry, drew fancied conclusions from an imaginary document.

The appellants submit, with confidence, that the codicil of *July* 1835 alone amounts to a substantive gift of the legacy of 140,000*l.* The reference in that codicil to a former codicil does not prove that the former one ever existed; even though it may be considered as having once existed, yet the gift of 140,000*l.* referred to as made thereby, is not revoked, and the non-production of such former codicil does not affect the validity of the gift of either the 140,000*l.* or the 60,000*l.* The codicil in the cause shews a still existing intention to give the 140,000*l.*, as well as the "60,000*l.* more." The words of reference to the supposed codicil, whether it was ever made or not, or, being made, was revoked, shew a subsequently revived intention to give the sum of 140,000*l.* The gift of that sum is unconnected with any purpose whatsoever.

It appears clear from all the testamentary papers that the testator was an illiterate man, so that it would be unsafe to rely on his use of words in their ordinary sense.

The word "purpose" in the codicil—if the testator annexed any meaning to it—is capable of three distinct interpretations: to two of them, the purpose of benefiting his native town, or the corporation individually, the objection of uncertainty would not attach. To the third interpretation alone, that the gift was made to the appellants, for the benefit of some private individual, the objection would be fatal. But it is hardly credible, "highly improbable," as the Vice Chancellor himself said—that the purpose of the gift was for a private person. Would not the testator rather give the individual the legacy directly, as he gave several other legacies by the same codicil? Or would he not make his friends and well paid executors, rather than a changeable body, such as a corporation, trustees for the individual? But if the "purpose" of the bequest was for the public benefit of the testator's native town, or for beneficial enjoyment by the Corporation, then it was reasonable to transfer the trouble of administering it from the executors to the Corporation.

This construction of the bequest is not affected by the objection of uncertainty. A Court of construction never requires positive certainty of purpose to establish a testamentary gift. Lord *Ellenborough* says, in *Driver v. Frank* (a), "When I speak of certainty, I must be understood to speak of moral certainty, the only certainty which relates to this subject; and hardly any certainty upon any moral subject can be predicated, which does not admit some degree of mere possibility to the contrary." It is the intention that the Court tries to find; and if of two constructions of ambiguous words in a will, one is improbable and inconsistent, and the other is consistent and probable, the Court will adopt the latter, and will ever prefer the construction which preserves the gift to that which destroys it. In *Wright v. Atkyns* (b), Lord *Eldon* says, "The cases at law amount to this, that if a man de-

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(a) 3 Maule & Selw., p. 50. (b) G. Coop. Ch. Cas., p. 122.



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vises to A. B., with remainder to his family, inasmuch as the Court never will hold a devise to be too uncertain, unless no fair construction can be put upon it, the heir at law, as the worthiest of the family, is the person taken to be described by the word 'family.' " Lord *Brougham* makes similar observations in *Winter v. Perratt* (a).

The word "purpose" applies to the gift of 60,000*l.* only. But a legacy given for a purpose not ascertainable, is not therefore void, inasmuch as the indication of purpose is not inconsistent with the intention of beneficial enjoyment of the legacy by the legatee; and an intention that he should take the legacy upon trust, is not to be presumed, without express words or necessary implication; *Cook v. Fountain* (b). If the testator gave these legacies upon "trust," using that word instead of "purpose," and then stopped, the trust would fail for uncertainty of the object; *Per Lord Eldon*, in *Morice v. The Bishop of Durham* (c). And so also if precatory words—words of request, desire, or recommendation, which create a trust—are annexed to a gift, unless both the subject and object are certain, the legatee takes the gift absolutely, unless the circumstances are such as amount to an intestacy (d); *King v. Denison* (e), *Walton v. Walton* (f), *Gibbs v. Rumsey* (g), *Cruwys v. Colman* (h), *Paul v. Compton* (i), *Pierson v. Garnet* (k), *Pushman v. Filliter* (l), *Ommaney v. Butcher* (m), *Hill v. The Bishop of London* (n), *Dashwood v. Peyton* (o), *Benson v. Whittam* (p), *Thorp v. Owen* (q). The same principle governs the Courts in sustaining defective exe-

(a) 9 Clark & Fin. 687.

(b) 3 Swans. 591.

(c) 10 Ves. 527-35.

(d) *Id.*, p. 536, *et seq.*

(e) 1 Ves. & B. 260.

(f) 14 Ves. 322.

(g) 2 Ves. & B. 294.

(h) 9 Ves. 319-23.

(i) 8 Ves. 375-80.

(k) 2 Bro. C. C. 41.

(l) 3 Ves. 7.

(m) Turn & R. 270.

(n) 1 Atk. 618.

(o) 18 Ves. 41.

(p) 5 Sim. 19.

(q) 2 Hare, 607.

cutions of powers of appointment; *Wilson v. Piggott* (r), 1846.  
*Poulson v. Wellington* (s), *Fortescue v. Gregor* (t),  
*Alloway v. Alloway* (u). The

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The Courts struggle to prevent intestacy by supplying deficiencies of expression, and presuming testators' intentions, rather than leave their bequests liable to the objection of uncertainty; *Castledon v. Turner* (v), *Fox v. Collins* (w), *Humphreys v. Humphreys* (x), *Phillips v. Chamberlaine* (y), *Price v. Page* (z), *Garvey v. Hibbert* (a), *Tomkins v. Tomkins* (b), *Mildred v. Robinson* (c), *Sheratt v. Bentley* (d).

These are only a few of the authorities which support the principle that the Courts will put a forced construction on the words, in order to give effect to the testator's intention where it can be ascertained. It is not the fault of the appellants, if, without the missing codicil, the Court cannot clearly ascertain the purpose of this gift; for that the respondents are responsible, as not producing all the testamentary papers. But there are many cases in which a bequest by recital of it, or by reference, as in this case, to a missing paper, containing the purpose of it, was sustained; *Martin v. Douch and Overton* (e), *Baylis and Church v. The Attorney General* (f), *Dormer v. Bishop Burnett*, cited in *Downing v. Townsend* (g), *Bibin v. Walker* (h), *Smith v. Fitzgerald* (i), *Knewell v. Gardiner* (k). In *Druce v. Denison* (l), Lord Eldon says, that "if a testator, by a subsequent paper, says he has bequeathed by

(r) 2 Ves., jun., 351.

(s) 2 P. Wms. 533.

(t) 5 Ves. 553.

(u) 4 Dru. & War. 380.

(v) 3 Atk. 258.

(w) 2 Eden, 107.

(x) 2 Cox, 185.

(y) 4 Ves. 51.

(z) *Id.* 680.

(a) 19 Ves. 125.

(b) 19 Ves. 126, note (b).

(c) *Id.* 588.

(d) 2 Myl. & K. 149.

(e) 1 Chan. Cas. 198.

(f) 2 Atk. 239.

(g) Amb. 280.

(h) Amb. 661.

(i) 3 Ves. & B., p. 7.

(k) Gilb. Cas. 184.

(l) 6 Ves., p. 397.

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a former instrument that, which he has not bequeathed, the Ecclesiastical Courts will hold that subsequent paper a disposition, as being a declaration of his will at the time he made it to dispose by the will, not in terms expressing that it is then his will, but that he has disposed of it before." In *Vaughan v. Foakes* (c), Lord Langdale says, "A recital of what a testator had done, or supposed he had done, may amount to a gift."

If these be not gifts to the Corporation of Gloucester for their beneficial enjoyment, it is submitted that they take them in their corporate capacity for public or charitable purposes; *Attorney General v. Syderfen* (d), *Mills v. Farmer* (e), *Commissioners of Charitable Donations v. Sullivan* (f), *Incorporated Society v. Richards* (g), Stat. 5 & 6 W. 4, c. 76, s. 71, *et seq.*, *Sonley v. Clockmakers' Company* (h), *Widmore v. Woodroffe* (i).

Mr. Turner for the respondent *Osborn*, and Sir F. Kelly for *Surman* (k), argued that the gifts of both sums of 140,000*l.* and 60,000*l.* were connected with the same purpose, and the purpose being unknown, the Court could not presume it; both gifts therefore were void for the uncertainty. [The arguments on these points are comprised in the Vice Chancellor's judgment, 3 *Hare*, pp. 141, 145.]

[The Lord Chancellor.—Suppose these were gifts to the trustees of the British Museum, "for a purpose before mentioned," but which was not mentioned, would it not be presumed that they were gifts to the trustees for the general purposes within the scope of their duty?]

There is no case in which the Court has ever gone so far as to presume the contents of a paper not produced,

(c) 1 Keen, 61.

(d) 1 Vern. 224.

(e) 1 Meriv. 55.

(f) 1 Dru. & War. 501.

(g) *Id.* 294.

(h) 1 Bro. C. C. 81.

(i) Amb. 636.

(k) Mr. Walker, Mr. Hodyson, Mr. J. Parker, Mr. Roll, and Mr. Jolliffe, were with them. The *Attorney General* was not a party to the appeal.

and founded its decision upon them. That would be to presume the intention of the testator; *Mills v. Farmer* (m), *Wheeler v. Sheer*, as explained by Lord Eldon in the case of *Moggridge v. Thackwell* (n).

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There could be no doubt that by the word "purpose" it was the intention to create a trust; *Stubbs v. Sargan* (o). The case of *Martin v. Douch and Overton* (p) is not to be relied on as authority for the point for which it was cited. *Dormer v. Bishop Burnett* (q), and other cases of that sort, referred to by the appellants, are of doubtful authority, and are neutralised by recent decisions; *Jerningham v. Herbert* (r).

They submitted that there was no gift at all of the 140,000*l.*, even if it was to be held unconnected with, and independent of, the word "purpose." There was no case cited in which the recital of a gift was construed to be a gift. The reference to this gift was only a mere supposition of the testator that he had given that sum; he did not recite it as a present gift, and therefore the principle of *Bibin v. Walker* (s), *Smith v. Fitzgerald* (t), *Vaughan v. Foakes* (u), *Wilson v. Piggott* (v), *Dashwood v. Peyton* (w), *Shelley v. Bryer* (x), and other cases, in which the Court assumed the intention and supplied words of gift, were not applicable to this case:—

[The Lord Chancellor.—What is the meaning of "60,000*l.* more?" Does not the addition show some prior gift?]

The recital that the testator had given the 140,000*l.* does not operate to give effect to it as a gift. Suppose the "purpose"—with which both sums are clearly connected—was unlawful or impossible, or subject to conditions which the

(m) 1 Meriv. 55.

(n) 7 Ves. 36; see p. 79.

(o) 3 Myl. & C. 507.

(p) 1 Cas. in Chan. 198.

(q) Cited in Amb. 280.

(r) 4 Russ. 388.

(s) Amb. 661.

(t) 3 Ves. and B. 7.

(u) 1 Keen, 61.

(v) 2 Ves., jun. 351.

(w) 18 Ves. 41.

(x) Jac. 207.

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Court would not enforce; such supposition shows at once the danger of holding the recital to operate as a gift.

[The *Lord Chancellor*.—If the gift was for a charitable purpose, the Court would give it effect, though the particular charitable purpose could not be ascertained.]

Certainly; but the Court would not presume it was for a charity, where charity was not mentioned. There may be a thousand other purposes besides charity, legal or illegal. There would be the greatest danger in presuming a testator's intention in one paper by reference to it in another paper. The gift may have been intended for accumulation beyond the legal period, or for corrupting parliamentary electors, or for other illegal purposes.

If the testator had intended these gifts for the beneficial enjoyment of the Corporation, would he not give the legacies to them unqualifiedly, as he did to his several friends mentioned in the same codicil?

In support of the arguments that the gifts failed for uncertainty of the purpose, with which both were evidently connected, and that even if they were presumed to be given in trust for a charitable purpose, such trust could not take effect, as being too indefinite, they cited, among other cases before referred to, *West v. Palmer* (a), *Collins v. Wakeman* (b), *Sonley v. The Clockmakers' Company* (c), *Morice v. The Bishop of Durham* (d), *Doe v. Aldridge* (e), *Sandford v. Raikes* (f), *Nash v. Morley* (g), *Kendal v. Granger* (h), *Ellis v. Selby* (i), *Williams v. Kershaw* (j), and the *Incorporated Society v. Richards* (k). They insisted that the cases of *Martin v. Overton* (l), *Dormer v. Bishop Burnett* (m), and *Baylis*

(a) 1 Chan. Cas. 224.

(b) 2 Ves., jun. 383.

(c) 1 Bro. C. C. 81.

(d) 9 Ves. 399; 10 Ves. 522.

(e) 4 T. Rep. 264.

(f) 1 Meriv. 646.

(g) 5 Beav. 177.

(h) 5 Beav. 300.

(i) 7 Sim. 352; 1 Myl. & C. 286.

(j) 5 Clark & Fin. 111 s.

(k) 1 Dru. & War. 258.

(l) 1 Ch. Cas. 198; Salk. 150.

(m) Cited in Amb. 280.

v. *The Attorney General* (n), relied on by the appellants, were too brief in the reports, differed in their circumstances from the present case, and the reasons given for the judgments were clearly wrong, or at all events inconsistent with subsequent decisions.

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As to the objection to the decree of the Court below for dismissing the bill without reserving to the appellants the right without prejudice to file a new bill, they insisted that that was a matter in which the Court exercised its best discretion on a full view of the pleadings.

Sir *T. Wilde*, in reply, urged the arguments before addressed to the House for the appellants, and in conclusion implored their Lordships, in case they should not reverse the judgment, not to part with the case without giving directions for further inquiry respecting the missing codicil.

The case stood over for consideration.

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Lord *Lyndhurst*.—The testator made a codicil to his will, dated *July* 1835, in the following terms: “In a codicil to his will I gave to the Corporation of Gloucester 140,000*l.* In this I wish that my executors would give 60,000*l.* more to them for the same purpose as I have before named.” He then, after bequeathing several large sums as legacies to different individuals, “confirms all other bequests, and gives the rest of his property to his executors, for their own interest.” The appellants claim under this codicil the 140,000*l.* and the 60,000*l.*

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The codicil refers to a former codicil. No such codicil has been produced. All we know of it is from the reference contained in the codicil of *July* 1835. The question upon this state of facts, therefore, is, what construction ought to be put by a court of justice upon the produced

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codicil? I confess that neither during the arguments at your Lordships' bar, nor at any time since, have I been able to bring my mind to entertain any doubt upon this question, and nothing but the very large amount of the sums in controversy, and the irrevocable effect of your Lordships' decision could have led me to pause upon the subject.

First, then as to the construction of the gift of 60,000*l.* :

The Vice Chancellor, in the judgment appealed from, first considered what would have been the proper construction of the codicil, if that legacy had been to an individual; and, secondly, whether any difference would result from the corporate character of the legatees. This was a convenient course, as much stress was laid at the bar (and properly laid) on the circumstance that the gift was to a municipal corporation. Looking then at the instrument, the testator, after stating what he had already given to the Corporation of *Gloucester*, in a former codicil, proceeds to say, "In this I wish my executors would give 60,000*l.* more to them for the same purpose as I have before named." When the testator speaks of the purpose he before named, to what is he referring? Where, and upon what occasion, was the purpose named? Obviously, I think, in the former codicil. He does not indeed tell us in terms where he had named the purpose, but the natural, and, I think, the only reasonable construction of the passage is, that he had before named the purpose in the former codicil, to which he was then referring, and in which that legacy was given.

But the former codicil is not produced, no account is given of it, and we have therefore no means of ascertaining the purpose for which the gift was made, or to what it is to be applied. In the same sentence in which the legacy is given, and immediately after the words of gift, the gift is stated to be for a purpose which the testator

defined, but which is wholly unknown and cannot be overed. How then could the legatee be allowed take the legacy for his own use? The purpose is a ification of the legacy; it is an essential part of it, and this is ascertained, it is wholly uncertain what the ee is to take, whether for his own benefit, or for the fit of others; and for whom, whether for private pur- s or for public or charitable objects. It is, therefore, nk, clear, that if the legacy had been to an individual, ust have altogether failed. What the testator in- ed—whom he meant to benefit—does not appear, and ot be ascertained.

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at a distinction had been taken on the ground that egacy is to a municipal corporation. It is said that ert would presume that a gift to a municipal corpo- n was for a public object; that, in fact, the property e Corporation, which the appellants represent, is, by act 5 & 6 Will. 4, chap. 76, entirely applicable to purposes—purposes which come within the legal rpretation of charitable objects; and that even if the cts were not fully ascertained, if the purposes of the est were charitable, the Court could supply the omis- . This is undoubtedly true; and I agree with the : Chancellor that the probability is that the legacy was n for some purpose that would be considered to be a itable purpose. But it cannot, at the same time, be ed that a municipal corporation may take property in : for the benefit of individuals, and for purposes alto- er private, and it is impossible to say, with that ee of legal certainty which would justify your Lord- s in giving effect to this bequest, that such was not :ase in the present instance.

or these reasons, which in substance are the same, gh less elaborately stated than those upon which the Chancellor rested his decision, I have come to the



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conclusion that the legacy of 60,000*l.* must fail. The same reasoning and the same objections will apply to the legacy of 140,000*l.* I submit to your Lordships, therefore, that the judgment of the Court below should be affirmed.

I beg leave to state, that the *Lord Chancellor*, who is unable to give his attendance here to day, entirely concurs in this opinion. He was present during the whole of the argument.

*Lord Brougham*.—This case, though of very large amount, 140,000*l.* and 60,000*l.*, making 200,000*l.* altogether, appears to me to rest upon exceedingly plain and simple grounds. I entirely agree with my noble and learned friend in the view which he has taken of the bequest, both as regards the first argument on the construction of the bequest, and the second argument with respect to its possible application. I am clearly of opinion that the right construction has been put upon it by the Court below, that it fails altogether, and that the property in question goes according to the destination pointed out by the decree; and, therefore I agree with my noble and learned friend's proposition to your Lordships, that this judgment should be affirmed.

Under the peculiar circumstances of the case (I do not enter into details), I submit to your Lordships that it is not a case in which costs should be given.

*Lord Campbell*.—In the course of my experience, I never read a judgment more cautiously expressed, and better reasoned than that of his Honour the Vice Chancellor *Wigram* in this case. I have only to state to your Lordships, that after having carefully considered the arguments on both sides, I entirely concur in the judgment which has been proposed.

The appeal was accordingly dismissed, and the decree appealed from was affirmed, without costs.

IN IRVING - - - - *Plaintiff in Error.*

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CHARLES JOHN MANNING and }  
JOHN L. ANDERSON - - - } *Defendants in Error.*

vessel is totally lost, within the meaning of a policy, when it becomes, as a ship, of no use or value to the owner, and is as much lost as if it had gone to the bottom of the sea, or had been broken to pieces, and the whole or great part of the fragments had reached the shore as wreck.

*Policy of Insurance.*  
*Total loss.*

It is also to be considered as total where a prudent owner, if uninsured, would not have repaired.

In a valued policy the agreed total value is conclusive.

A policy of insurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree before hand in estimating the value of the subject assured by way of liquidated damages.

A ship was insured in a policy, in which the value was stated at 7,500*l.* The ship was injured by storms, was surveyed, and the repairs were estimated at 10,500*l.* When repaired, the vessel would have been of the marketable value of 9,000*l.* The assured abandoned and claimed as for a total loss. The jury found that, under the circumstances existing in the case, a prudent owner, uninsured, would not have repaired the vessel: and, by the Lords, affirming the judgment of the Court below, that the assured could recover as for a total loss.



There was a writ of error on a judgment of the Court of the Queen's Bench, which had affirmed a judgment of the Court of Common Pleas, in an action of assumpsit brought against *John Irving*, the defendant in the Court

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below, as the representative of the Alliance Marine Insurance Company. The plaintiffs below were the managing owners of a vessel called the *General Kyd*, upon which a policy of insurance had been effected with this Company for the sum of 3,000*l.* The ship was valued in the policy at 17,500*l.*, and was insured for a voyage "at and from *China* to *Madras*, while there, and back to *China*, not east of *Hong Kong*, with leave to call at the *Straits*." The first count of the declaration was on this policy, and the loss claimed was a total loss, which was averred to have happened through the perils of the sea. There were the usual money counts. The defendant pleaded to the first count that the vessel was not wholly lost in manner and form, &c. ; and to the remaining counts *non assumpsit*.

The cause was tried before Mr. Justice *Cresswell*, at *Guildhall*, at the sittings after Trinity Term, 1844, when a verdict was found for the plaintiffs. The facts were stated in the form of a case for the opinion of the Court, and were afterwards turned into a special verdict, which stated that on the 6th *June*, 1843, the plaintiffs effected with the defendants the policy on their ship, the *General Kyd*, for the purpose of *bonâ fide* covering and protecting themselves from the loss of the said ship, together with its stores, seamen's wages, and other matters not constituting part of the permanent value of the ship ; that no insurance was effected by them on the freight ; that the ship was of the burthen of one thousand three hundred and eighteen tons ; was built originally, and at great expense, for and employed in the trade of the East India Company, and was, on the said East India Company ceasing to trade, sold to the plaintiffs for 11,000*l.* ; that at the time of effecting the policy the ship was, together with stores, seamen's wages, and other matters not constituting part of the permanent value of the ship, of the value to the plaintiffs of 17,500*l.*, and was insured for that sum ; that the plaintiffs were interested, as the declaration set forth,

and that the ship set sail on the voyage mentioned; that during the risk, and while prosecuting the voyage, the ship was damaged by perils of the sea, so as to become incompetent to proceed on the said voyage, unless repaired as after mentioned; that the necessary expenditure to repair such damage, so as to render the ship sea worthy, and competent to proceed on the voyage, would have amounted to a sum of not less than 10,500*l.*, and that if such repairs had been done, and such expenditure had been incurred, the ship being so repaired would have been worth a sum not exceeding 9,000*l.*, and which was its marketable value, as well at the period of effecting the said policy, as also immediately before the said damage; that a prudent owner, being uninsured, would not have repaired the vessel, and that the vessel was duly abandoned to the underwriters.

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The question was, whether, under the circumstances set forth in the special verdict, the defendant was liable as for a total loss. The Court of Common Pleas gave judgment for the plaintiffs (*a*). The defendant brought a writ of error in the Exchequer Chamber where that judgment was affirmed (*b*). The writ of error was then brought in this House. The judges were summoned, and Barons *Parke* and *Alderson*, Justices *Patteson*, *Coleridge*, *Coltman*, and *Maule*, Baron *Rolfe*, Justices *Wightman* and *Cresswell*, Baron *Platt*, and Justices *Erle* and *Vaughan Williams*, attended their Lordships.

Sir *F. Kelly*, and Mr. Serjt. *Channell* (Mr. *Lathom J. Browne* was with them) for the plaintiff in error. —The judgment of the Court below rests upon the au-

(*a*) 1 Com. Bench Rep. 168.

(*b*) By Lord Chief Baron *Pollock*, Justices *Patteson*, *Coleridge*, and *Wightman*, and Barons *Parke*, *Alderson*, and *Rolfe*. See 2 Com. B. 784.

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thority of two cases ; *Allen v. Sugrue* (c), and *Young v. Turing* (d). It is submitted that the principle declared in both those cases, that there is, in respect of a question of partial or total loss, no distinction between an open and a valued policy, is erroneous, and that, at all events, such a principle cannot govern the decision in this case.

There are three classes of cases in which total loss may occur. The first is where the ship absolutely sink and is in fact lost ; the second, where the ship itself may not be in fact totally lost, but may be unable to continue the voyage, being injured past repair ; and the third, where the ship can be repaired, but the expense of repair will be so considerable, that after the repairs have been effected, the vessel will fetch less in the market than the sum expended in repairing it. This third class is now known as the class of a constructive, total loss. The present case is of that class ; and the owners insist that they may refuse to expend a sum of 10,500*l.* in repairs ; may therefore convert a loss which is only partial, and capable of reparation, into a total loss ; may thereby cast on the insurers a loss of 17,500*l.*, and thus gain a large profit on the loss of their vessel. It is submitted that they are not entitled to this advantage.

Nothing is clearer than that a policy of insurance is a contract of indemnity, and in no case will the law give the party insured more than an indemnity. If the assured can here recover as for a total loss he will obtain more than an indemnity ; he will do so even upon his own statement of the value of the thing insured. The policy is on the ship alone ; stores and other matters are not insured. The ship is not said to be worth 17,500*l.*, but to be so together with stores, provisions, and seamen's wages. To allow the assured to recover the whole of that sum will be to allow him to recover more than an indemnity for the thing he has insured, by taking into calculation things which he has not insured.

(c) 8 Barn. & Cres. 561 ;      (d) 2 Man. & Gr. 593 ; 2  
 3 Man. & Ryl. 9.                      Scott, N. R. 752.

But he will also obtain more than an indemnity, even with regard to the ship itself, if he should be allowed to recover as for a total loss. Under the circumstances which exist in this case, the vessel might have been repaired, and might have continued the voyage. The voyage was not, therefore, totally lost, it might have been continued had the vessel been repaired, and a profitable freight might have been earned. The assured was not entitled to make this question one of a comparison of advantages and disadvantages, and on the balance of that comparison to decide, to put an end to the thing insured, and claim as for a total loss. The practice of claiming a total loss where the ship is not past repairing, is one of very modern origin. It is one of a dangerous kind, and may introduce fraud into insurance cases.

Although the law considers the ship, upon being abandoned, to be totally lost, still, when that abandonment takes place upon a valued policy, and the value on the policy so far exceeds that which is proved to be the real value of the ship, the law will not allow the assured to recover the value stated in the policy, for that would be to break through a great legal principle, and to give the assured more than an indemnity. There are several cases in which the party has not been permitted to recover more than the actual value of the ship. *Hamilton v. Mendez* (e) is one of that kind. There the ship had been captured, and recaptured, and abandoned, but the recapture of the vessel having been effected, and the vessel brought safe into port before action brought, the Court held (f) that "the plaintiff, upon a policy, can only recover an indemnity according to the nature of his case, at the time of the action brought, or, at most, at the time of his offer to abandon." The case of *Lewis v. Rucker* (g)

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(e) 1 Sir W. Bl. 276; 2 Burr.  
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(f) 2 Burr. 1214.

(g) 2 Burr. 1167.

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is to the same effect, when the principle adopted in that case comes to be attentively considered; for there it was distinctly said (*h*) that "the only effect of the valuation is fixing the amount of the prime cost," and the assured only recovered the real amount of the loss.

It is true that, in the case of a valued policy, where there has been an actual total loss, no question can arise as to the sum to be paid to the assured, for that sum has been fixed by the policy itself, which, according to Lord *Mansfield* in the cases just cited, definitively settles what shall be taken as the prime cost of the things insured; but where, as in this case, the loss has not been an actual total loss, but the owner has the option to repair or abandon, it is not consistent with justice, nor can it be reconciled to the policy of the law, that the assured shall receive the whole value agreed upon in the policy, when that has only been agreed upon as that which is to be paid in the event of an actual total loss. That agreement can only be carried into effect where the loss is actually total. Here the ship would be, when repaired, of the value of 9,000*l.*, and it cannot be said that, that being so, the underwriters must pay the sum of 17,500*l.*

It cannot be contended that, because the policy is a valued policy, the sum stated in it is conclusive as against the insurer, and against him alone. The case of *Hamilton v. Mendez* (*i*), already cited, shews that the real amount of the loss may be considered upon a valued policy. And the case of *Forbes v. Aspinall* (*k*) is even more directly an authority for that proposition. There, upon a valued policy upon freight, the plaintiff was only allowed to recover for the freight on the fifty-five bales of cotton actually on board at the time of the loss. And in accordance with that doctrine is the opinion of Mr.

(*h*) 2 Burr. 1171.

(*k*) 13 East, 323.

(*i*) 1 Sir W. Bl. 276; 2 Burr.

1197.

Justice *Story*, as quoted in an American work on Insurance (l), where it is said, "In giving an opinion on this question, Mr. Justice *Story* says,—‘ In what respect does the case of the ship differ from the case of the goods, as to the ascertainment of the damage? Can the valuation in the policy be a more correct guide in the one case than in the other? The question in each case is necessarily the same—what is the present value of the property compared with its value before the injury? and for the same purpose; to fix the extent of the damage sustained by the accident. One should suppose that this was the true measure of the damage in all cases in which it is attainable. The valuation on the policy, cannot, in the case of the ship, any more than of the goods, measure the proportion of the damage, because the value may, in the mean time, have essentially changed. And yet it is that proportion which is the object of the inquiry. The law deems the ship worth repair, unless injured more than half its value. At what time?—Surely at the time of the injury.’—*Peele v. The Merchants Insurance Company* (m). The doctrine of Mr. Justice *Story* has been distinctly adopted by the Supreme Court of the United States; *Patapasco Insurance Company v. Southgate*" (n).

In the next page of that work it is said, "On the other hand the Supreme Court of *Massachusetts* has laid down the doctrine, that the rule of abandonment for damage over half of the value, refers to the value in the policy... In the first of the decisions referred to, this Court says the value in the policy is *primâ facie*, and, in the absence of other testimony, the true value. *Winn v. The Colonial Insurance Company* (o)." But this doctrine, in laying down which Mr. Justice *Story* himself took part,

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(l) Phillips on Insurance,  
vol. 2, p. 273.  
(m) 3 Mason, 27.

(n) 5 Pet. S. C. R. 604.  
(o) 11 Pick., 279.



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does not in reality contradict the former, for it admits that "other testimony" may be given to shew the true value, and if so, the value stated in the policy ceases to be conclusive between the parties. It is, therefore, submitted that the policy must, in the case of a merely constructive total loss, be treated as an open policy, and the real amount of the loss must be ascertained. If, as the assured contend, the policy is to be treated as an open policy, when the question of the propriety of repairing the ship is under consideration, it must equally be so treated when the amount payable in respect of the loss is to be determined. It is open for all or closed for all purposes. If it is closed for all, then it is clear that the owners had no right to abandon on account of the expence of repairing, and then to claim for a total loss; for the ship existed in specie and might have been repaired, and, being repaired, would then have been a good sea risk. The principle adopted in *Hamilton v. Mendez* (which case was not cited either in *Allen v. Sugrue*, or in *Young v. Turing*) is that which must govern the present case. The judgment of the Court below is in contradiction to the first principles of marine insurance law, and must be reversed.

The *Attorney General* and Sir *F. Thesiger* (Mr. *Greenwood* was with them) for the defendants in error.

The question here is not, what is the amount to be paid? but has there, or has there not been a total loss? For the purposes of this case there is no distinction between an open and a valued policy. If so, the assured was entitled to recover, for there can be no doubt that the loss here was a total loss. The facts shew it to be so, and it is so found in the special verdict, which declares that, under the circumstances existing in this case, a prudent owner being uninsured would not have repaired the vessel. It is contended that the fact of the policy being a valued policy cannot affect the question of the right to recover

as for a total loss, when the loss is shewn to be in the nature of a total loss.

It is said that a policy of insurance is a mere contract for indemnity, and the main objection to the right of the assured rests upon that argument. It is in some respects a contract of indemnity, but not so as to prevent the right of the assured to recover as for a total loss upon the assessment of that total loss made in the policy itself. That this is a valued policy cannot affect the question, whether this is a case of total loss or not. It would have been a total loss upon an open policy, and the special verdict finds that the circumstances of the loss were such that a prudent uninsured owner would not have repaired the vessel. Upon an open policy it is therefore clear that the plaintiff would have been entitled to recover for a total loss; why should he not do so upon this which is a valued policy? This is an attempt to overturn the decision in *Allen v. Sugrue* (a), which has been recognized as an authority ever since it occurred. It is true that neither in that case, nor in *Young v. Turing* (b), which confirmed and adopted the former, was the case of *Hamilton v. Mendez* referred to. But it is impossible to doubt that that case was known to the counsel who argued, and the judges who decided both the latter cases, and that it was not cited simply because it was not deemed applicable; and it is not, for the only question there was to what extent the goods insured had been injured. It is not denied that a policy of insurance is in some respects a contract of indemnity, but that indemnity is not to be measured by the mere amount for which the vessel would sell at the moment of the abandonment being made. If that measure of value was alone applied to it, the assured would not be indemnified. The indemnity is to be measured by what

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(a) 8 Barn. & Cr. 511; 3  
Man. & Ry. 9.

(b) 2 Man. & Gr. 593; 2  
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was agreed to be the value of the ship when the insurance was made. That was the rule which the Court applied in the case of *Shaw v. Felton* (c), though there the value of the thing insured was daily becoming less during the voyage. There an insurance was effected on ship and goods, valued at a certain sum, on a voyage to *Africa* and the *West Indies*. The assured was held entitled to recover on a total loss which happened at the latest period of the voyage, although a considerable part of the estimated value consisted of stores and provisions for the purchase and sustenance of slaves during the voyage. The judgments of Mr. Justice *Lawrence* and Mr. Justice *Le Blanc* are important on this point. The former said (d), "As the practice of binding parties as to the amount of their interest by valued policies has obtained ever since the statute of Geo. II., it would require very strong reasons to show that it is wrong. The effect of a valued policy is not to conlude the underwriter, and prevent him from showing that the assured had no interest, and that in fact it was a mere wagering policy within the statute ; but in order to avoid disputes as to the *quantum* of the assured's interest, the parties agree that it shall be estimated at a certain value. Here it is not pretended that the subject matter of the insurance was not of the value estimated in the policy. Then how does this differ from the case of an open policy in this respect. Would it not be sufficient for the assured in an open policy to prove that at the time the ship sailed the subject matter of the insurance was of such a value? Is not that the period to look to, and not the state of the thing at the time of the total loss happening?" And Mr. Justice *Le Blanc* said (e), "The value of the property must be continually diminishing, and if the loss should happen at the latter end of a long voyage, no doubt the

(c) 2 East, 109.

(e) 2 East, 116.

(d) 2 East, 115.

property must be considerably deteriorated by the usual wear and tear, and yet it is never objected that the underwriter is not liable for the original value." There is no authority whatever which supports the doctrine that the assured is not entitled to recover beyond the actual loss, as measured by the value of the ship at the moment that loss occurs, while both these judgments lay down an exactly opposite rule. The case of *Allen v. Sugrue* is opposed to such a doctrine as that which is contended for on the other side; and there are two cases which occurred between the period of the decision of *Allen v. Sugrue* and *Young v. Turing*, both of which proceed on the principles recognized and adopted in those decisions. One of these is the case of *Edington v. Jackson* (f) before Mr. Baron Alderson. The notes taken in that case, by Mr. Justice Creswell then at the bar, on an application for a new trial, give this account of the case. The action was on a valued policy, and there Lord Tenterden said it may be prudent not to have a valued policy, but we must decide the question of total loss or not just as we should in a case of an open policy; and the Court, composed of Justices Littledale, Parke, and Patteson, expressly concurred with that opinion. The other case was that of *Herne v. Ray*, before Mr. Justice Maule (g), in which that learned judge expressly adopted the rule as laid down in the case of *Allen v. Sugrue*, and his ruling there was never afterwards questioned. Then came the case of *Young v. Turing* (h), and considering the circumstances in that case, it is impossible to imagine a stronger authority for the doctrine now contended for on the part of the defendants in error. In delivering the judgment of the Court, Lord Chief Justice Tindal said (i), "I am not aware of any

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(g) Tried at Liverpool, in the year 1842.

(h) 2 Man. & Gr. 593; 2 Scott, N. C. 752.

(f) Tried at York in the year 1832.

(i) 2 Man. & Gr., 601; 2 Sc., N. C. 761.

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case or principle in the law of insurance which makes the estimated value in the policy a circumstance on which the question of total or partial loss ought to turn. The agreed value in the policy of the subject insured is intended to save the expence and doubt that may attend the investigation of value, as affecting the *quantum* of compensation only. It may operate, according to events, to the advantage or detriment of either party; and where no fraud exists, both are bound by it." No cases can be cited to impeach the doctrine thus distinctly laid down, and the attempt now made is therefore a mere attempt to avoid its application to the present case. It is, in substance, contended on the other side, that the fact of a policy being valued, ought to be taken into consideration in deciding the question of total or partial loss. Such a proposition cannot be maintained, yet if not maintainable, the arguments on the other side are absolutely inapplicable and valueless.

There are two classes of losses, total and partial, but the expression "constructive total loss" is not a happy one; it introduces confusion into the subject. Whether the loss is total by the absolute sinking of the ship to the bottom of the sea, or by the circumstance that it has sustained such an injury, and is in such circumstances that no prudent uninsured owner would attempt its repair, there is equally a loss of the vessel and the voyage, and an end of the risk. Both cases must proceed on the same principle. It is not pretended to be denied that if the vessel here had been actually sunk, the owner would have been entitled to recover the full amount stated in the policy. Suppose it had been known that at the moment when the ship foundered in the open sea it was only worth 5000*l.*, it cannot be pretended that the underwriter would have been entitled to say, "I will only pay you 5000*l.*" Yet he might say so if it is true that, to all intents and in every respect, a policy of insurance is a mere contract of indemnity, and nothing more. In some respects it is a contract

of indemnity, but it is a contract which, in the case of a valued policy, while it promises an indemnity, settles and declares what shall be the amount of that indemnity. The case of *Lewis v. Rucker*, so much relied on by the other side, is an authority for that proposition. In that case, Lord *Mansfield* says (*j*), “a valued policy is not to be considered as a wager policy, or like interest or no interest; if it was, it would be void by the act 19 Geo. 2. The only effect of the value is fixing the amount of the prime cost, just as if the parties admitted it at the trial. . . It is settled that upon valued policies the merchant need only prove some interest to take it out of the 19 Geo. 2, because the adverse party has admitted the value; and if more was required, the agreed valuation would signify nothing. But if it should come out in proof that *A.* had insured 2000*l.*, and had interest on board to the value of a cable only, there never has been, and I believe there never will be, a determination that by such an evasion the Act of Parliament may be defeated.” This last expression clearly shows what was Lord *Mansfield’s* meaning when he spoke of a policy of insurance being a contract of indemnity.

A similar observation may be made with regard to what Lord *Mansfield* says in *Hamilton v. Mendez* (*k*):—It is clear that a policy being a contract of indemnity is an expression which must be understood with respect to the subject matter. There a capture and recapture had taken place—there was nothing but a delay of the voyage; and the question was whether the assured, by the mere act of his own will, had a right to turn a partial into a total loss. The point of that judgment may be found in this expression of Lord *Mansfield* (*l*), “If the thing in truth was safe, no artificial reasoning shall be allowed to set up a

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(*j*) 2 Burrow’s Reports, 1171      (*k*) 2 Burr. 1198; 1 Sir W. Bl. 277.  
(*l*) 2 Burr. 1212.

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total loss." But in that very judgment he assumes that total loss may depend on something besides the actual destruction of the vessel, and he says (*m*), "It does not necessarily follow that because there is a recapture, therefore the loss ceases to be total."

The case of *Aspinall v. Forbes* (*n*) has nothing to do with the present. There the insurance was on freight, and the ship was lost when only some of the goods on which freight was to be earned were on board. Of course, though that was a valued policy, the value was fixed upon the freight of a full cargo, and when only a small part of the cargo was on board, that which had to give rise to the freight was not in existence. Lord *Ellenborough* distinctly put the judgment upon that ground. Provided the thing on which the insurance was to take effect, and on which the value was calculated, was in existence, the policy would attach, and, when once it had attached, the value in the policy must be taken as conclusive. Thus: suppose there was a valued policy on a ship, and after the policy was effected, but before the loss, a decree of the Government should issue, which produced the result of lessening the value of all shipping by one-half, that would not affect the right of the insured to recover the value according to which he had insured.

The argument here amounted to this, that if the expences of repairs do not exceed the value of the policy, then the loss is to be deemed only a partial loss. But it is impossible to produce any decision, or any declared principle of law, to support such a proposition. The grounds on which the assured may recover for what is called a constructive total loss, are those on which a prudent uninsured man would not go to the expence of repairs, but would put an end to the voyage. Such have always, hitherto, been deemed sufficient. But it is now,

(*m*) *Id.* 1209.

(*n*) 13 East, 323.

for the first time, contended that that is not the test, but that a new element must be introduced into the discussion of the question—that the value fixed in the policy must be taken into consideration, and that if that value exceeds the amount required for repairs, though that amount may itself be greater than the value of the vessel after the repairs have been executed, the owner must nevertheless repair the ship and submit to the loss. This would be to put him, when insured, into a worse position than if he had not been insured, and would convert what the plaintiff in error asserts to be a contract of indemnity into a contract to incur loss without the hope of indemnity.

According to all the principles of marine insurance law there has been a total loss, and if so, then the assured are entitled to recover the value fixed in the policy. The fact that a value has been so fixed cannot affect the question, which is simply, whether the loss is a total or a partial loss?

As there can be no doubt that it is a total loss, the title of the assured is complete, and the judgment of the Court below must be affirmed.

Sir *F. Kelly* in reply.—There is in this case a conflict of principles. The first principle controverted here is that a policy of insurance is a contract of indemnity, and nothing more; the next is that which governs the Courts with respect to a valued policy. The parties here have admitted the value of the ship. That fact must be taken as settled, and then it is said that where the ship is insured on a valued policy, and is totally lost, there can be no inquiry into the value at the time of the loss, for the parties, as between themselves, have admitted it. But taking that argument to be true in part, and true as applicable to cases of actual total loss, it is not true when the case is merely one of constructive total loss. From all

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the authorities, the paramount principle on which a distinction is founded may be deduced. In the case of ship positively lost—sunk to the bottom of the sea—there can be no conflict of principle, the contract is on to indemnify the assured for the loss actually sustained. But if the loss is not actual, but only constructive, all the circumstances attending it must be taken into consideration, and in that sense of the word the policy is an open policy. A different doctrine cannot be reconciled with the principle that a contract to indemnify is of the very essence of a policy of insurance.

The ship here is valued at 17,500*l*. As between the parties it is therefore said, that it must be taken as conclusive that the ship is of that value. But if so, it may be so taken for all purposes, against the owner as well against the underwriter. Then how stands this case? The owner comes into Court and claims for a total loss. When he has proved that the ship has been totally lost he may recover the value stated in the policy; but to prove that it will cost him 10,500*l*. to repair the ship, does not prove that the ship is totally lost, and till he gives that proof he cannot be entitled to recover. As the proof stands in the present case, the owner has merely proved that he has sustained a loss of 9,000*l*., and yet he claims to recover 17,500*l*. That is not indemnity, it is profit. A party cannot be permitted thus to prove a loss of a certain amount, and on that proof to recover something which far exceeds that amount.

To pass from the principle of law to the decided case—There can be no doubt that all those cases are unfavourable to the claim of the owners. In *Hamilton v. Mendon* the Court held, that though value was not generally an open question on a valued policy, yet, that cases might arise in which it would be absolutely necessary, in order to maintain other and more important principles of law—to shew what was the real value.

- And in *Lewis v. Rucker*, Lord Mansfield said, that he desired it to be understood that in a valued policy the plaintiff could not recover more than the actual value when the loss occurred. And that principle is the more strongly to be enforced in this case, because, though the ship alone was insured, the valuation was made on the ship, the stores, provisions, and seamens' wages. The case of *Forbes v. Aspinall* fully supports this argument. There the insurance was on freight, and the damage claimed was for more cargo than was on board the ship when it was lost, and there it was held, that where the valuation is for a greater sum than is actually lost, the indemnity cannot go beyond that loss.

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It is clear that where there is a valued policy, the sum mentioned in it must be taken to be the value of the ship as respects both parties, and for all purposes whatever, or for none, and cannot be treated as a fixed sum for one purpose, and an unfixed and unsettled sum for another. It cannot, therefore, be treated as a settled amount for the purpose of the demand on the underwriter, but as an unsettled and unascertained amount, when the conduct of the assured in putting an end to the voyage and converting a partial into a constructive total loss comes to be considered. Yet, unless this inconsistent mode of dealing with the policy can be supported, it is clear that the assured cannot here make out a title to claim as for a total loss.

The *Lord Chancellor* moved that the following question be put to the Judges :—"Whether, in the judgment upon the special verdict in this case, the damages ought to be taken on property assessed at 3,000*l.*, or at 1,500*l.*?"

The Judges requested time to consider the question.

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Mr. Justice *Patteson*, in the absence of Barons *Parke* and *Alderson*, stated the answer of the judges in the following terms :—I am desired by the judges, who heard the whole of the argument at your Lordships' bar, to give their answer to this question, and to state their opinion that the plaintiff below was entitled to recover, upon the facts found by the special verdict, the sum of 3,000*l*.

Upon the record it appears that the action was on a policy for 3,000*l*. on a ship valued at 17,500*l*. The other facts found by the special verdict show, that it was fairly valued at that sum (and, indeed, it would be assumed that it was so, unless fraud had been pleaded and proved), and then it is found that the vessel during the voyage was so damaged as to be incompetent to proceed without repairs; that the necessary expenditure, in order to repair and make it seaworthy, would have amounted to 10,500*l*., and that the ship would have been then worth 9,000*l*. only, which was its marketable value then and at the time of the policy; that a prudent owner, uninsured, would not have repaired the vessel; and that it was duly abandoned to the underwriters.

If this had not been the case of a valued policy it is clear that on the facts found there was a total loss; for a vessel is totally lost, within the meaning of a policy, when it becomes of no use or value as a ship to the owner, and is as much so as if the vessel had gone to the bottom of the sea, or had been broken to pieces, and the whole or great part of the fragments had reached the shore as wreck; and the course has been in all cases in modern times to consider the loss as total where a prudent owner, uninsured, would not have repaired.

In an open policy, therefore, the assured would have been entitled to recover for a total loss, the amount to be ascertained by evidence.

What difference then arises from the circumstance that the policy is a valued policy?

By the terms of it, the ship, &c., for so much as *concerns the assured, by agreement* between the assured and assurers, are and shall be rated and valued at 17,500*l.*, and the question turns upon the meaning of these words.

Do they, as contended for by the plaintiff in error, amount to an agreement that for all purposes connected with the voyage, at least for the purpose of ascertaining whether there is a total loss or not, the ship should be taken to be of that value, so that when a question arises whether it would be worth while to repair, it must be assumed that the vessel would be worth that sum when repaired?

Or do they mean only, that for the purpose of ascertaining the amount of compensation to be paid to the assured, when the loss has happened, the value shall be taken to be the sum fixed, in order to avoid disputes as to the *quantum* of the assured's interest?

We are all of opinion that the latter is the true meaning; and this is consistent with the language of the policy, and with every case that has been decided upon valued policies.

In the case of *Lewis v. Rucker (a)*, on a valued policy on goods, the amount to which the underwriter was held liable for a partial loss was ascertained by computing such a proportion of the value in the policy as the difference between the price for which sound goods would have sold at the port of delivery, and that for which the damaged goods, actually sold, bore to the price for which sound goods would have sold. So that in estimating the extent of the loss, that is, in determining whether it was a loss to the extent of one half, one third, or to any other extent, the value in the policy was wholly disregarded, and nothing was considered but the state of the goods as ascertained by their selling prices. If sound goods would have brought double

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(a) 2 Burr. 1167.

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the price of the damaged, the loss was one half, or fifty per cent., whatever the value in the policy might be. But the extent and nature of the loss being ascertained by this comparison, the underwriter was held liable to pay the proportion so ascertained of the value in the policy; and this mode of treating partial losses on goods is always adhered to. Now the question whether a loss is total or partial, is a question of the same nature as the question, what is the extent of a partial loss? and there is the same reason in both cases for excluding the consideration of the value in the policy from the inquiry as to the extent of the loss, and for treating that value as binding on the question of, how much the subject so totally or partially lost was worth; so that the mode of determining the question, whether the loss was total or not, which has been adopted in this case, agrees, in so far as it excludes the consideration of the value in the policy, with that in which the inquiry into the extent of a partial loss on goods is always conducted. Such has been the construction put upon valued policies in the cases which are questioned in this writ of error; *Allen v. Sugrue* (b); *Young v. Turing* (c); and *Egginton v. Lawson*, 1832; and *Herne & Hay*, 1842, cited by Sir F. Thesiger. Those cases have now been considered, for many years, as having settled the law, and have been the basis on which contracts without number have been formed, and they ought not on slight grounds to be departed from. The principle laid down in these latter cases is this: that the question of loss, whether total or not, is to be determined just as if there was no policy at all; and the established mode of putting the question, when it is alleged that there has been, what is perhaps improperly called, a constructive total loss of a ship, is to consider the policy altogether out of the question, and to inquire what a prudent uninsured owner

(b) 8 Barn. & Cres. 561.

(c) 2 Man. & Gr. 593.

would have done in the state in which the vessel was placed by the perils insured against.

If he would not have repaired the vessel, it is deemed to be lost.

When this test has been applied, and the nature of the loss has been thus determined, the *quantum* of compensation is then to be fixed.

In an open policy, the compensation must be then ascertained by evidence.

In a valued one, the agreed total value is conclusive; each party has conclusively admitted that this fixed sum shall be that which the assured is entitled to receive in case of a total loss.

It is argued that this course of proceeding infringes on the generally received rule, that an insurance is a mere contract of indemnity, for thus the assured may obtain more than a compensation for his loss; and it is so.

A policy of assurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages, as indeed they may in any other contract to indemnify.

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The *Lord Chancellor*.—My Lords, in this case of July 23. *Irving v. Manning*, which was before your Lordships a short time since, your Lordships called in the assistance of the learned judges. All the learned judges who were present at the hearing, were clearly of opinion that the judgment of the Court below was correct, and in that opinion all the noble and learned Lords who attended that hearing also concur. I have therefore only to move your Lordships to affirm the judgment of the Court below in favour of the defendant in error.

*Lord Campbell*.—My Lords, I am extremely glad that a question which has agitated Westminster Hall for the

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last thirty years is at last solemnly decided by a judgment of your Lordships. It is a question of great importance to the commerce of this country. I entirely concur in the opinion expressed by my noble and learned friend upon this subject.

My Lords, it appears to me that upon the just construction of this contract, the plaintiff was entitled to recover the sum which the jury has awarded him. If you look at the contract, it seems to me that it was definitively determined that, for all purposes, the value of the ship should be taken at the sum of 17,500*l*. There was nothing illegal in this contract; we have only to put a construction upon it, and if it be a just construction, and there is neither any rule of common law nor any statute to prevent that construction being carried into effect, we are bound to give effect to it, and to pronounce in favour of the plaintiff below.

I repeat that I rejoice that this question, which has so long agitated Westminster Hall, is now for ever set at rest, and is satisfactorily decided.

Judgment affirmed, with costs.

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|-----------------------------------|---|---|---|---------------------|---------------------------------------------|
| HENRY PINKUS                      | - | - | - | <i>Appellant.</i>   | 1846.                                       |
| THE RATCLIFF GAS-LIGHT and COKE   | } |   |   | <i>Respondents.</i> | May 11, 12,                                 |
| COMPANY, GEORGE OFFOR, and others |   |   |   |                     | 18, 25;<br>June 8, 15.<br>1847.<br>July 21. |

The appellant having claimed to be a partner with one *Paynter* in gas works, which the latter had erected and was about to sell to a Company then about to be formed, it was agreed between them, for the purpose of ending their disputes respecting the ownership of the gas works, that *Paynter* should be at liberty to sell the works at such price as he pleased, upon accounting to the appellant for the value of the works at a certain rate, and that *Paynter* should hold shares for the appellant in the company to the value of £2,000 for two years. The Company having been formed, and having purchased the gas works from *Paynter*, the appellant filed a bill against him, and obtained a decree for specific performance of their agreement. Before that decree was made, the Company was dissolved, and the gas works were sold to the *Ratcliff* Gas-light and Coke Company. The appellant then filed a new bill against *Paynter*, the *Ratcliff* Company, the directors of the dissolved company, and the assignees of *Paynter*, who had become bankrupt, to establish a lien upon the gas works for what should be found due to him under the former decree, as well as to carry out the former decree against all these parties :—

*Agreements.*  
*Specific per-*  
*formance.*  
*Companies.*  
*Lien.*

Held, by the House of Lords, affirming a decree of the Vice Chancellor, that the sale of the gas works by *Paynter* to the *London* Company was authorised by the appellant's agreements; that he had no just claim against the Company, or lien on the property, and that the supplemental bill was properly dismissed, with costs, as against all the defendants, except *Paynter* and his assignees.

THIS was an appeal against a decree of the Vice Chancellor of *England*, in a suit instituted by the appellant for the purpose of enforcing certain agreements entered into between him and one *Paynter*, relating to a gas manufactory at *Prossom's* Island and *New Crane, Shadwell*, as



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against all the respondents (except one who was a mortgagee of the appellant's interest under the agreements). *Offor*, and five other respondents, were directors of a company called the "*East London Gas-light Company*," and claimed an interest in the property in question under a purchase from *Paynter*. The respondents, the *Ratcliff Gas-light and Coke Company*, claimed a similar interest as purchasers from the *East London Gas-light Company*. The remaining respondents were the assignees of *Paynter*, who became a bankrupt after the institution of the suit.

The appellant had, in the year 1827, invented improved methods for generating and purifying gas, for lights and other purposes, and being desirous of obtaining patents to secure the exclusive use of the inventions, he and *Paynter* entered into agreements, dated respectively the 17th of *April* and 20th of *August*, 1827, by which—after reciting the said inventions, and that in consideration of *Paynter* having agreed to advance money for making working models of them, and for obtaining patents, and paying the appellant 200*l.*, and 400*l.*, and other sums, in the events therein mentioned, the appellant had agreed to sell to *Paynter* a moiety of his inventions, and of the gains and profits to arise therefrom, and that the same should be established and carried on for their joint and equal benefit, subject to the terms and in manner therein mentioned—covenants were entered into by the parties for performance of these agreements. Patents were taken out for both inventions in the same year, for terms of fourteen years each, and leases were obtained of premises in *Prossom's Island* and *New Crane, Shadwell*, which were demised to *Paynter* alone for long terms of years from the year 1830. Upon these premises the appellant and *Paynter* erected extensive gas works, and carried on the manufacture of gas, according to the appellant's inventions, *Paynter* finding all the necessary capital. The premises were held, and the manu-

factory carried on, upon the terms of the agreements, for the equal benefit of the appellant and *Paynter*, who was the acting and ostensible partner, and in whose name the contracts were usually entered into. An agreement on account of the partnership was entered into in *July*, 1830, between *Paynter* and *George Barlow*, which recited the granting of the leases of the premises, and the erection of the works; and that contracts had been entered into for the supply of gas, producing a gross rental of 3,000*l. per annum*; and then it was agreed that the possession of all the property, and the benefit of the contracts were to be made over to *Barlow* for twenty-one years; and he agreed, during that term, to manufacture and supply gas, pay all expenses, enter into further contracts for supplying gas, collect the rents, retain certain allowances, including a salary, and to pay over the residue to *Paynter*.

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In *August* 1830, *Paynter* being desirous to form a company which should purchase the gas works, caused copies of a prospectus to be circulated, headed, "Proposals for the establishment of an Association, to be called the *East London Gas Company*." The prospectus stated that the proprietors of the said gas works were invited to extend their mains, &c., for the supply of gas to a wider district, at moderate prices, and proposed a scheme for forming a company, with a nominal capital of 30,000*l.*, in 2000 shares of 15*l.* each, of which sum 8*l.* per share would be required forthwith, and which, it was alleged, would be sufficient for the purchase of the works and mains.

On the 10th of *August*, 1831, an agreement was entered into by *Paynter* and the appellant, which recited their intention that the said works and establishment should be sold, and the proceeds paid to *Paynter*, in order to the just division thereof between them both; the accounts of *Paynter* for his disbursements to be submitted to arbitrators named by him and the appellant, and that whatever balance

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should be ascertained by the award to be due to *Paynter* for his disbursements, should be first paid out of the proceeds of the intended sale; the residue to be equally divided between him and the appellant. The agreement then provided for the reference and for distribution of the proceeds of the sale, according to the recitals.

Shortly after that agreement *Paynter* renewed a negotiation with *Offor*, and others of the respondents, for the formation of a joint-stock company; but this negotiation was concealed from the appellant, who, on becoming acquainted with it, wrote to one of the respondents, reminded him that he was joint proprietor of the gas works, that he would not sanction the negotiation unless terms were made with him, and that he dissented from those proposed by *Paynter*.

An agreement was, notwithstanding, concluded on the 25th of *October*, 1831, between *Paynter* of the first part, *Offor* and others of the second part, and *Barlow* of the third part, for the sale of the gas works, plant, and property, with the lease of the premises, &c., for 17,500*l.*, to a Company to be formed by these parties. The material parts of the agreement were, that the before-mentioned covenant with *Barlow* should be cancelled, and a new one entered into between him and the directors of the proposed Company; that *Paynter* should take shares in the Company to the extent of one-sixth of the whole, and should not sell or transfer them for two years, without the consent of the directors; that the capital of the Company should be 30,000*l.*, to be raised by 6000 shares of 5*l.* each; that all instalments should be paid to the bankers of the Company, and 75*l.* per cent. thereon should be paid to *Paynter*, in part of the purchase-money (the instalments due on his own shares to be given credit for as part of such payment), until 13,500*l.* should be paid to him, during which time he was to receive the rental (which was stated at 3,300*l.*) and allow interest at 5*l.* per cent. on such payments as he

should receive; and after payment of the 13,500*l.* the Company were to receive the rental and pay interest after the like rate on the balance of 4000*l.* till the same should be paid, and then the leases and all the property should be assigned to the directors; that if the Company should not be formed, all the expenses incurred should be borne by *Paynter*, but if it should be formed, then by the Company.

The parties to the agreement issued a prospectus of the “*East London Gas-light Company*,” and the provisional directors therein named passed resolutions to the effect that no person should hold or transfer shares in the Company without the approbation of the directors, which resolutions were, as the appellant alleged, intended to exclude him from all knowledge of what was taking place between *Paynter* and the Company.

This agreement was not discovered by appellant, as he alleged, until more than a year afterwards. In the mean time he and *Paynter* entered into an agreement, dated 29th of *October*, 1831, for sale of the works to a Company to be formed, *Paynter* thereby agreeing to take and pay for shares in such Company of the value of 2000*l.* for the appellant, and hold them for his interest for two years after the formation of the Company, the appellant to receive all the profits on the shares during such years, *Paynter* after the expiration of the two years to transfer them to the appellant, and he in consideration thereof agreeing that *Paynter* might sell said works for such price as to him might seem proper. Then followed other stipulations, one of which was that *Paynter* should, after the sale, account to the appellant as to the proceeds under the agreement of *August*, for the value of the works at a price which at 7*l. per cent. per annum* would produce an income equal in amount to the net rentals then payable to the proprietors, which price should be divided between them according to the said agreement. Among the other stipulations, was one which provided for the mu-

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tual release of the parties, in certain events named, as partners in the gas works.

The appellant being apprised of the formation of a company, by the circulation of the prospectus before mentioned, sent a letter in *January* 1832, to the directors therein named, informing them that he was partner with *Paynter* in the said gas works.

The provisional directors of the proposed company met, and after considering the said notice, and the several agreements between the appellant and *Paynter*, resolved that it was their opinion that the property and title to the gas works were vested in *Paynter*, and that he had full power to carry the agreement with them into effect. They accepted an offer made by *Paynter* to deposit one thousand shares in the new company with bankers, as an indemnity against the appellant's claims.

The proposed company was formed in *February* 1832, by the name of the "*East London Gas-light Company*," and a deed of settlement was executed, and a sum of 6,000*l.* was paid to *Paynter* as a first instalment, under the agreement of the 25th of *October*, 1831. He at the same time repudiated the agreements with the appellant of the 10th *August* and 25th *October*, 1831, and in *July* 1832 he assigned the whole property in the gas works to the directors of the said Company, he himself having taken two thousand shares in the concern, five hundred of which he held in trust for the appellant, under the agreement of the 29th of *October*, 1831.

In *May*, 1833, the appellant filed a bill against *Paynter*, and two others, incumbrancers on the appellant's interest in the said works, stating most of the matters hereinbefore stated, and praying that the said agreements between the appellant and *Paynter* of the 10th of *August* and 29th *October*, 1831, might be carried into execution, and that *Paynter* might be decreed to concur in all acts

requisite for that purpose, particularly in effecting a transfer to the appellant of the shares taken on his account, pursuant to the agreement of the 29th of *October*, 1831, and that all proper accounts might be taken of *Paynter's* disbursements on account of the said works and premises, and that the same might be valued by competent persons, and *Paynter* decreed to account to the appellant for the value of the said works and premises, at a price which, at 7*l. per cent. per annum*, would produce an income equal in amount to the net rental which at the time the agreement of the 29th *October*, 1831, was executed, was payable to the proprietors of the said works; and that such net rental might be ascertained with reference to the additional customers obtained for the gas: And that *Paynter* might be declared liable to pay to the appellant a moiety of the value so to be ascertained, after deducting the balance which should be found justly due to him on account of his disbursements, and subject also to the deduction of the 200*l.* in the agreement of the 29th *October* 1831 mentioned; and that out of the shares in the newly established company which had been taken by *Paynter*, he might be decreed to be a trustee for the appellant of shares, which at the time of taking the same, were of the value of 2,000*l.*, and for which the sum of 2,000*l.* was paid by him; and to account for and to pay over to the appellant, all the dividends and profits accrued due thereon, which had been received by him or for his use.

*Paynter*, in his answer, stated the agreement with, and conveyance to, the directors of the "*East London Gas-light Company*" of the said works and premises, and that the purchase money was 17,100*l.*, of which he received 7,200*l.* in cash, and the balance in shares; and he took and paid for shares of the value of 6,000*l.*, viz., one thousand five hundred shares at 4*l.* each, and he insisted that the appellant had no interest in such shares, and that

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their agreements of the 10th of *August* and 29th of *October*, 1831, were void.

Subsequently to the answer, and before the hearing of the cause, alterations were made in the nature and amount of the indemnity, before stated to have been provided by *Paynter* for the said Company against the appellant's claims; and a negotiation, commenced in *June* 1833 between the *East London Gas-light Company* and the respondents, the *Ratcliff Gas-light and Coke Company*, was carried into effect by an agreement dated the 15th of *April*, 1835, made between the respondents *Offor* and others, the then directors of the former Company, of the one part, and certain persons therein described as the committee of management of the latter Company, of the other part, by which, for the consideration of 22,500*l.*, partly in cash and partly in shares, as therein mentioned, the parties of the first part agreed to sell the whole leasehold premises and property of their Company to the respondents, the *Ratcliff Gas-light and Coke Company*, and to procure the regular dissolution and winding up of the affairs of the former Company.

The appellant, on being informed of this agreement, gave notice to the directors of both Companies of his claims in the gas works and premises, and of his suit against *Paynter* to enforce such claims. Notwithstanding that notice, a deed was executed, the 15th of *April*, 1835, by the parties to the last mentioned agreement, conveying and assigning the whole property upon the terms thereof. And the directors of the then dissolved company executed to the *Ratcliff* company a bond in the penal sum of 20,000*l.* against all costs or damages to which they might be put in defending themselves against the claims of the appellant in the property; and by way of counter security to the obligors, *Paynter* executed to them an indenture, dated the 1st of *October*, 1836, whereby—after reciting among other

things the bill in the suit of *Pinkus v. Paynter*, and the said bond, and that *Paynter*, at the time of the dissolution of the “*East London Gas-light Company*,” held one thousand two hundred and thirty-five shares therein, in his own name; and in case they were his own absolute property, discharged from any claim of the appellant, then the proportion of the purchase money of 22,500*l.*, paid by the *Ratcliff* Gas-light and Coke Company for the premises, which *Paynter* would be entitled to receive in respect of his said shares, would be 6,175*l.*, of which sum 2,500*l.*, with 240*l.* for dividends, would be payable to the appellant, if he should establish his claim in his said suit—it was, therefore, agreed that out of the said purchase money the sums of 2500*l.* and 240*l.* should be invested in the purchase of 3,032*l.* 8*s.* 11*d.*, consols. And such sums were accordingly so invested in the names of *Paynter* and others of the respondents, upon trust to indemnify the proprietors of shares in the dissolved Company, at the time it was dissolved, against the claims of the appellant.

The cause of *Pinkus v. Paynter* was heard on the 6th *December*, 1836, before the Vice Chancellor of *England*, when his Honour declared that the appellant was entitled to specific performance of the agreements of the 10th of *August* and 29th of *October*, 1831, and decreed that the same should be performed, and carried into execution; that the appellant was entitled to an immediate transfer and assignment to him of the five hundred shares in the *East London Gas-light Company*—of which the certificates had already been deposited by *Paynter* in the hands of his clerk in Court, under orders made in the cause, the 28th of *March*, and the 3rd of *May*, 1833—and to all profit or emolument which had arisen from such shares; and that *Paynter* should accordingly execute to the appellant a proper transfer and assignment of such shares, and pay to him all profits and dividends that were re-

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ceived on these shares by him, *Paynter*, or by others by his order. And it was ordered that the Master should ascertain the value of the said works and premises, computed at a price which, at *7l. per cent. per annum*, would produce an income equal in amount to the net rental payable to the appellant and *Paynter*, as proprietors of the said works, on the 29th of *October*, 1831; and should take an account of all their dealings and transactions, receipts and payments, in respect of the patents, works, and premises, and of any other works and premises in which the appellant and *Paynter*, were or had been jointly interested, having regard to the before stated agreements of *April* and *August* 1827, and the said agreements of the 10th of *August* and the 29th of *October*, 1831; and should ascertain the balance due on such account.

Notice of this decree was served by the appellant on the directors of the two companies.

The sums of 131*l.* 17*s.* 4*d.* Bank Annuities, and 7*l.* 18*s.* 4*d.* cash, were, in pursuance of the decree, transferred and paid to the appellant, and also certificates of five hundred shares were delivered to him, one hundred and fifty of which were delivered by him, pursuant to the said decree, to persons who were incumbrancers on his interest in the gas works.

The Master, in *March* 1837, made a separate report with reference to the dividends and profits which had been received by *Paynter*, in respect of the said five hundred shares in the *East London Gas-light Company*, over and above the said sum of 131*l.* 17*s.*, and which he found to amount to 256*l.* 13*s.* 4*d.* That sum was paid by *Paynter* to the appellant, as the decree directed.

The appellant was unable, as he alleged, to prosecute his said decree with effect, owing to the delivery of the books of the *East London Gas-light Company* to the *Ratcliff Gas-*

light and Coke Company ; and inasmuch as both that Company and the directors of the former Company had, throughout the whole of their transactions, acted with full notice of his rights, against *Paynter*, the appellant, in June 1839, filed a bill against all the parties, which, after stating and charging most of the matters hereinbefore stated, prayed that the appellant might have the benefit thereof, as a supplemental bill against *Paynter*, and as an original bill against the several other defendants thereto ; and that he might have the benefit of the said several matters in prosecuting the said decree, as against *Paynter*, and might also have the benefit of the aforesaid agreements, and of the said suit, and of the evidence therein, and of the said decree and other proceedings, as against all the other defendants ; and that it might be declared that not only *Paynter*, but also the other defendants were liable and bound to make good to the appellant, the five hundred shares in the East London Gas Light Company, to which, by the said decree, he was declared entitled, and the profit, interest, and emoluments which had arisen from such shares, so far as the same had not then already been made good to him ; and that in order thereto he might be declared entitled to fifty shares in the *Ratcliff* Gas-light Company, as from the dissolution of the East London Gas-light Company and the transfer of the said works and premises to the *Ratcliff* Company, or the union of the two companies, in lieu of such five hundred shares, or to the value of such fifty shares, computed as therein mentioned, or to a proportionate part, or so much of the said sum of 22,500*l.* purchase money, as was properly attributable to such five hundred shares, together with interest thereon at 5*l. per cent. per annum*, at the appellant's option ; and that all the defendants might be declared to be bound by the accounts, which by the said decree were directed to be taken of the several other matters and things therein men-

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tioned ; and that not only *Paynter*, but also the respondents, *Offor* and others, the directors of the late *East London* Gas-light Company, and also the said works premises so sold to the *Ratcliff* Gas-light and Coke Company, or the last mentioned Company in respect thereof, might be declared to be chargeable, and might accordingly be charged with the balance which should be found due to the appellant on the taking of such account with lawful interest thereon ; and that such balance, and the interest thereof, might be raised and paid by the defendants, or some of them, out of the said works premises, and the rental, rates and monies of the *Ratcliff* Gas-light and Coke Company ; or otherwise that the rights and interests of the appellant, as against the said defendants in respect of the said matters, might be ascertained and declared. The bill also prayed for a manager or receiver, and for an injunction.

The respondents, *Offor* and others, directors of the *East London* Company, put in a joint answer, and the respondents, the *Ratcliff* Gas Company, also put in their answer, and they all by their several answers admitted the notices hereinbefore mentioned to have been received by them or their officers respectively ; but they insisted that the purchase made by the *East London* Gas Company from *Paynter* of the leasehold messuages, gas works and other premises, and the subsequent sale of the same to the *Ratcliff* Gas Company, were respectively valid and effectual as against the appellant, and that he was not entitled to any relief as against them, the answering parties.

*Paynter*, by his answer to the last-mentioned bill, insisted upon his right to sell the said messuages, gas works and premises, under the aforesaid agreements entered into between him and the appellant.

*Paynter* was declared a bankrupt soon afterwards, and his assignees were then made defendants to the bill.

The supplemental cause was heard by the Vice Chancellor of *England*, in *July* 1843, and in *January* 1844 his Honour made a decree ordering the bill to be dismissed, with costs, as against all the defendants, except the assignees of *Paynter*, out of whose estate they were to retain their costs; and it was ordered that the accounts directed to be taken by the decree of *December* 1836, made in the said cause of *Pinkus v. Paynter*, should be prosecuted as against them as such assignees. And it was declared that the estate of *Paynter* was liable for the value of the five hundred shares in the *East London Gas-light Company*, together with interest thereon, from the 25th of *March* 1835, after setting off what (if any thing) might be found due from the appellant to the estate of *Paynter* upon taking the said accounts (a).

The appeal was brought against so much of this decree as ordered the dismissal of the bill as against the said several defendants thereto, and as directed their costs to be paid by the appellant, and the accounts directed by the former decree to be prosecuted only against *Paynter's* assignees, and as declared that his estate only was liable for the value of the said shares in the *London Gas-light Company*.

Mr. *Kindersley* and Mr. *W. P. Wood*, for the appellant:

The facts stated and proved, on behalf of the appellant, in the Court below, entitle him to the relief prayed by his supplemental bill, or similar relief, or at least part of such relief. Under the agreements entered into between himself and *Paynter* on the 10th of *August* and 29th of *October*, 1831, and the previous agreements between them, the appellant had, in the first place, a lien on the partner-

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(a) See 13 Law Journ. (Eq.) 244.

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ship property, and also on the purchase monies for which the same might be sold, for the full amount of his interest in that property, estimated on the basis of the agreement of the 29th of *October*, 1831, according to the rental on that day, or at least to the extent of the purchase monies. In the next place, the appellant had, by the said agreement, dated the 29th of *October* 1831, an independent right to shares of the value of 2000*l.* in the company about to be formed, as therein mentioned; and to all such benefit as the possession of the said shares might entitle him to.

The respondents, the directors of the *East London Gas-light Company*, were affected with direct notice of all the appellant's rights and interests in the partnership property, and of his rights as against *Paynter*, when they entered into the agreement of the 25th of *October*, 1831. They had also direct notice of the instruments executed on the 29th of *October*, 1831, before any payment whatever was made by them to *Paynter* by virtue of their agreement. By their conduct, and also by virtue of the notice, they placed themselves, personally, and the company of which they were directors, in precisely the same position, as regarded the rights of the appellant, as that in which *Paynter* himself stood, as to the partnership property, the purchase monies, and the shares of the value of 2000*l.* And the respondents, the *Ratcliff Gas-light and Coke Company*, being also affected with direct notice, as well as by the pendency of the suit of *Pinkus v. Paynter*, were bound to deal with the property and the purchase monies agreed to be paid by them for it, including the part payable in shares, in the same manner as *Paynter* and the directors of the *East London Gas-light Company* would have been bound to do. After the purchase was effected between the two companies, and the purchase money paid in money or by shares in the *Ratcliff Company*, the directors of the dissolved company gave a bond of indemnity to the

*Ratcliff* Company against any claims of the appellant, and took a counter-indemnity from *Paynter*, who, for their security, invested 2740*l.* in consols, in the name of trustees. The sum of 3023*l.* 8*s.* 11*d.*, 3*l.* consols so purchased, was set apart by the respondents, or some of them, as representing the five hundred shares assigned to the appellant; he is entitled to that sum of 3023*l.* 8*s.* 11*d.*, 3*l.* consols, and the dividends which have accrued thereon, either as representing the said five hundred shares, or as part of the unpaid purchase monies for the partnership estate and effects.

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Mr. *Stuart* (with whom was Mr. *Chandless*) for the respondents, the *Ratcliff* Gas-light and Coke Company, pointed out discrepancies between the decree in the suit of *Pinkus v. Paynter*, and the prayer of the supplemental bill, and contended that the relief sought by the latter bill was inconsistent with the decree made in the original cause, and also inconsistent with the relief sought in that suit: that by the agreements of the 10th of *August* and 29th of *October*, 1831, between the appellant and *Paynter*, *Paynter* had a full and absolute right to sell the manufactory, works, and premises, at his sole discretion, and to receive and give a good discharge for the proceeds of such sale; and that right was exercised, *bonâ fide*, and for a valuable consideration, duly paid to him by the East *London* Gas-light Company, in which the appellant never was a shareholder: that if he was by law a shareholder in that Company, he could only have shares therein according to its constitution, and must take such Company just as it was formed, and upon the ground on which it was formed; and that it must be taken, as against him, that the East *London* Company was formed, was carried on, and was ultimately dissolved, and the manufactory, works, and premises sold to the *Ratcliff* Company, according to the terms of the deed of the 21st of *February*, 1832, by which the East *London* Company was created: that the appellant was well

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aware, before the decree was made in the cause of *Pinkus v. Paynter*, of all the circumstances touching the sale of the manufactory, works, and premises, to the East London Company, the dissolution of that company, and the ultimate sale of the manufactory, works, and premises to the *Ratcliff* Company, upon which he founded his title to relief in the supplemental cause. By the prayer of his bill he recognised the dissolution of the East London Company, and at the same time prayed that these respondents might make good to him the five hundred shares in the Company, which he so admitted to be dissolved, the dissolution having been effected strictly and completely in compliance with the provisions of the deed of settlement of that Company. Under these circumstances the Vice Chancellor could not justly do otherwise than dismiss the bill as against these respondents.

Mr. *Bethell* (with whom was Mr. *Smythe*), for the respondents, *Offor* and the other directors of the dissolved East London Gas-light Company, also argued that the case made and the relief prayed by the appellant in his bill against the *Ratcliff* Company and these respondents, was inconsistent with the case made and the decree taken by him in his original suit against *Paynter*: that according to the true construction of the agreements of the 10th of *August* and the 29th of *October*, 1831, *Paynter* had full power to sell the gas works and premises to the East London Company, and the appellant was not entitled in equity to any lien upon the said works, or to any relief against the East London Company as the purchasers thereof,—in which company he never was a proprietor—or against the indemnity fund; *Colyear v. The Countess of Mulgrave* (a). In that case the Master of the Rolls says, “I apprehend that when two persons, for valuable consideration between themselves, covenant to do some act for the benefit of a mere stranger, that stranger has no

(a) 2 Keen, 81; see p. 98.

right to enforce the covenant against the two, although each one might as against the other." The indemnity fund here was the subject of a private agreement to which the appellant was not a party, and to the benefit of which he was not entitled; but if he claimed to be interested in that fund, he could not maintain the claim without consenting to adopt and confirm the sale by the East *London* Company to the *Ratcliff* Company; which he refused to do.

If the appellant had any case to make against the East *London* Company, such case could not be maintained against these respondents after the dissolution of the company; he ought to have instituted his proceeding when he first became acquainted with the circumstances upon which he relied, and of which he was aware before the date of the decree against *Paynter*. The Vice Chancellor's judgment comprised, in a few words, a complete answer to all the appellant's demands. (13 L. Jour. 246.)

Mr. *Walker* (with whom was Mr. *Rolt*) for the respondents, the assignees of *Paynter*:

The agreement for indemnity, in pursuance of which the indemnity fund was set apart in the names of trustees, was entered into exclusively between *Paynter* of the one part, and the directors and proprietors of the East *London* Company of the other; and such agreement was entered into, and the fund was set apart solely as a counter-indemnity to the directors of that company, against the bond of indemnity given by them to the *Ratcliff* Company. The appellant was not in any way a party to the agreement, nor in any way interested in it, or in the indemnity fund, either under the indenture or declaration of trust of the 1st of *October*, 1836; and, instead of acquiescing in and confirming the agreement, he claims relief inconsistent with it.

The appellant has not made a case for any relief against *Paynter* or his assignees, or against any other person or

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Company, except under and by virtue of the agreements between *Paynter* and himself, in *August* and *October* 1831. Under those agreements the appellant had not any lien upon the gas works and premises sold by *Paynter* to the *East London Company*, or any claim against that Company, or any person or Company claiming the gas works and premises under or through them, either in respect of the shares of the value of 2000*l.*, which, by the agreement of the 29th of *October*, 1831, *Paynter* agreed to purchase and pay the price of for the appellant, or in respect of the balance, if any, which, upon taking the accounts mentioned in the agreements, might be found due to him from *Paynter*.

The appellant had, long previous to the decree of *December* 1836, in the first suit against *Paynter*, full knowledge of every circumstance relied on by him in the cause, in which the decree now appealed from has been made; and so far as he had not previously obtained the full benefit which could be obtained by him from the decree of 1836, the decree now appealed from gives him the full benefit of that decree, and all the relief to which he is entitled as supplemental thereto; any other relief would be inconsistent with the case made by the appellant in the first suit, and with the decree made in that suit. That was rather a harsh decree on *Paynter*, although the respondents, his assignees, did not complain of it.

Mr. *Kindersley* replied.

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Lord *Lyndhurst*.—This case which, at first view, seems to be long and complicated, will be found, when stripped of superfluous matter, to resolve itself into one or two not very difficult questions. And first as to the purchase of the Gas Works by the *East London Company*: That pur-

chase was expressly authorised by the agreements of the 10th of *August* and the 29th of *October*, 1831. *Pinkus* was aware that *Paynter* was in treaty for the sale of the property to a company; he was apprehensive that it might be sold for an inadequate price, and to obviate all difficulties on this head, the second agreement of the 29th *October* was entered into, by which it was stipulated that *Paynter* should be at liberty to sell the works for whatever sum he might think proper, but that in his accounts with *Pinkus* he should be charged upon the purchase according to the rate stated in that agreement.

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It was upon the faith of these agreements, and the authority which they conferred upon *Paynter*, that the East *London Gas Company* was afterwards formed, and the works were sold to that company according to the terms stipulated in the previous conditional agreement of the 25th of *October*, 1831. The appellant's notice, dated the 30th *December*, 1831, and served on the 27th of *January*, 1832, would not affect the transaction. It merely stated that the plaintiff was a partner in the property with *Paynter*, which was perfectly consistent with the agreements authorizing the sale, and appeared on the face of those agreements.

The plaintiff, far from repudiating these agreements, insisted upon them, filed a bill against *Paynter* for a specific performance, and obtained a decree accordingly. He says that at the time of signing the agreement of the 29th of *October*, he was not aware of the conditional agreement made by *Paynter* for the sale to the intended company, and that it was carefully concealed from him by *Paynter*. But, assuming this to have been the case, and the concealment to have been material, he has since, with full knowledge of the fact, ratified these agreements, by his subsequent suit against *Paynter*, and the decree

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which he has obtained in that suit, and upon which he is now proceeding.

The next question is : What rights has the plaintiff acquired by this sale against the East *London* Gas Company ? And first as to the purchase money : it was expressly stipulated between the plaintiff and *Paynter*, by the agreement of the 10th *August*, 1831, that the purchase money should, in the first instance, be paid into the hands of *Paynter*, in conformity, as it was said, with the existing agreements. It is equally clear, from the agreement of the 29th *October*, 1831, that the plaintiff was not to look for any part of the purchase money to the company, since *Paynter* was to account with the plaintiff, not for the sum received upon the sale, but according to an estimated value to be applied by *Paynter*, agreeably to the stipulations contained in the previous agreement of *August*. The purchase was afterwards paid for by the company to *Paynter*, partly in money, and the residue by an appropriation of shares in the company. The plaintiff can therefore have no claim, either against the company or their property, in respect to the purchase money upon this sale.

But the appellant was, by the agreement of the 29th of *October*, not only entitled to the benefit in account as against *Paynter*, for his share of the estimated value of the property, but he was also, as a consideration for his agreeing to the sale, to have an interest in certain shares in the concern, to the value of 2,000*l*. They were to be taken in the name of *Paynter* in trust for the appellant, and to be transferred by him into the plaintiff's name at the expiration of two years. By the company's deed of settlement, it was declared, as is usual in such instruments, that as between the company and any person claiming to be a proprietor, the share register book should be conclu-

sive evidence of his right as proprietor; that the registered proprietors should alone have a voice, and be entitled to act in the proceedings of the company, that payment to the registered proprietor and his receipt should be a sufficient discharge in all cases of trust or any other interest, and that no person's name should be substituted as a proprietor, without the consent of a certain number of the directors, nor should any person be entitled to the rights and privileges of a proprietor until he should have signed a deed of covenant to abide by the rules and regulations of the company. When the appellant agreed with *Paynter* to take an interest in the shares of the company, he could only take such interest as far as the company was concerned, subject to the regulations by which the company was governed. The company was not bound to consider him as a proprietor, for his name had not been entered as such in the share register book; he never was entitled to act as a proprietor, and accordingly in his first bill, he confined his complaint exclusively to *Paynter*, praying against him personally for a specific performance of the agreements between them, for a transfer of the shares, and for an account.

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This leads, then, to the consideration of the subsequent part of these transactions. While this suit was depending, and in the month of *May* 1835, measures were taken for dissolving the East *London* Company, in conformity with a power reserved for that purpose in the deed of settlement. The requisites of the deed in this respect were strictly complied with. The directors were in consequence authorised and required to sell the property: they accordingly disposed of it to the *Ratcliff* Gas Company, a rival establishment. The competition between these two companies had been injurious to both, and the sale, which seems to have been a prudent and beneficial transaction, was clearly within the competence of the respective parties.

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The price was fixed at 22,500*l.*, a part of which was to be paid in shares estimated at 50*l.* each, and which were to be allotted to such of the East London proprietors as should be willing to take them.

The plaintiff, being informed of these proceedings, caused a notice to be served upon the East London Company, and the Ratcliff Company, of his claims, of the pendency of the suit in Chancery, and other matters, and declaring that he should hold them liable for any loss he might sustain in respect of his interest in the shares to which he claimed to be entitled.

In consequence of this notice, the Ratcliff Company refused to complete their purchase without being indemnified against this claim. The directors of the East London Gas Company executed a bond for that purpose, and they required, on their part, a counter security for the protection of themselves and the shareholders. For this purpose a proportion of the purchase money, payable in respect of *Paynter's* shares, sufficient to cover the claim of the plaintiff, was, with *Paynter's* assent, vested in the funds in the names of trustees. Soon afterwards a decree was obtained in the case of *Pinkus v. Paynter*, directing, among other things, that *Paynter* should assign to the plaintiff the shares which he so held in trust for him.

In this state of things the present bill has been filed against the two companies, and against *Paynter* and his assignees.

First, then, as to the Ratcliff Company : The purchase which they made from the directors of the East London Company appears to have been a perfectly fair transaction. The resolution passed at the meeting of proprietors of the East London Company to dissolve the company was in accordance with the provisions of the deed of settlement. The power of the directors to sell was given by the same instrument, and was a consequence of the resolution

to dissolve. The price is not shewn to have been inadequate; that price has been paid by the *Ratcliff* Company to the directors of the *East London* Company, who, according to the deed of settlement, were the persons to receive it. There appears, therefore, no ground for maintaining this suit as against the *Ratcliff* Company, and the bill was properly dismissed as against them.

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Then as to the directors of the *East London* Company: they had authority to dispose of the property, and it was their duty to do so. If, by reason of the appellant's notice, the sale could not be completed without the bond, it was proper to give it, and they had a right to insist upon the counter indemnity. The transaction was, I think, within their powers, under the deed of settlement, as a consequence of the dissolution. Independently of any assent on the part of *Paynter*, they had, I think, a right to retain a sufficient portion of the purchase money to protect themselves and the shareholders against the effect of their bond, and the plaintiff's proceedings against the *Ratcliff* Company.

It is further to be observed, that, according to the deed of settlement, by the provisions of which in respect of these shares the plaintiff is bound, the produce of a sale of the property upon a dissolution was to be paid to the proprietors, that is, to those registered as such. The directors were, therefore, authorised to pay *Paynter* the proportion due in respect of the shares standing in his name, and consequently, as I conceive, to retain or apply it by his authority for their indemnity. They cannot, I think, be deprived of this security till they are discharged from their liability to the *Ratcliff* Company, and secured from all other loss or damage in respect of which the indemnity was given. These are questions which cannot be settled in this suit, and I think, therefore, the bill was

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properly dismissed by the Vice Chancellor as against the East *London* Company and their trustees.

The appeal must, therefore, be dismissed, and, I think with costs.

Lord *Campbell* concurred.

The appeal was ordered to be dismissed, and the decree complained of to be affirmed, with costs, to be paid by appellant to the three sets of respondents, namely, *Ratcliff* Gas-light and Coke Company, the directors of (dissolved) East London Gas-light Company, and assignees of *Paynter*. (See Lords' Jour. for 21st *June* 1847.)

*Paynter* himself did not put in an answer to the petition of appeal, and did not appear by counsel at the hearing of it.

|                                 |   |                    |                       |
|---------------------------------|---|--------------------|-----------------------|
| FREDERICK SQUIRE, RICHARD KING, | } | <i>Appellants.</i> | 1848.<br>Feb. 11, 14. |
| and JOHN SQUIRE - -             |   |                    |                       |
| MARY PHILIPPA WHITTON - -       |   | <i>Respondent.</i> |                       |

A BOND, void in law, may be enforced as an agreement in equity, subject to the effect of the equitable circumstances under which it was made. *Void Bond. Inoperative Agreement.*

An instrument, purporting to be a bond, executed by the obligor, with blanks for the name of the obligee, and therefore void in law, is inoperative in equity as an agreement, there being no second contracting party. *Surety. Concealment.*

A party joining as surety in a bond, ought to be informed of the nature of the obligation, name of the obligee, and the relation in which he stands to the principal obligor.

*M.* induced *W.* to join him as surety in a bond for repayment of a loan, saying he only wanted time to realize securities, and he would hold her harmless. *M.* and *S.* being trustees of a fund, sold it, with consent of *B.*, the *cestui que trust*, and thereby raised the loan for *M.*, who informed *W.* that *B.* was the lender, but did not inform her how the loan was raised :

Held that, *B.* not being in fact the lender, his personal representatives had no privity of contract with, nor equities against, *W.*, and that, in consequence of the concealment from her of the real nature of the transaction, she was, in equity, altogether released from the bond.

IN the year 1833, Mr. *William Morgan*, a stock-broker in *London*, being suddenly required to provide a large sum of money, applied to his friends for pecuniary assistance, and, amongst others, to Mrs. *Whitton*, with whom he had been for many years on terms of intimate friendship, and was then co-executor with her of the will of her late husband. Mr. *Morgan* wrote to her the following letter :—



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London, 7th August, 1833.

"My dear friend, — On Friday Mrs. Morgan and myself went to *Ramsgate*, &c. But if any one regretted the loss of a friend, it is poor me, at this moment, at the loss of dear Mr. *Whitton*; for, to make short of my story, *William* (the writer's eldest son) in my absence, entered into a speculation most unaccountable, which I have to make good in seven days from the present; and in order to give time to realize other securities, may I ask the favour of you to join me in a bond for 10,000*l.*, which will give me time to make arrangements. You may depend upon it I will hold you harmless; but your answer must be by return of post, or it would be too late for my purpose. I shall take the first opportunity of seeing you, to state particulars; in the meantime believe me, my dear friend, yours, &c., *William Morgan*."

What answer, or whether any, was made to this letter did not appear; Mrs. *Whitton* being about seventy-six years of age, when she put in her answer to the bill, was not able to recollect; (a) and Mr. *Morgan* in his answer said that by her particular desire he from time to time destroyed all the letters which he received from her.

On the 9th August, 1833, a letter was written by the appellant *John Squire*, to Mr. *Robert Farthing Beauchamp*, who was then residing in *Somersetshire*, and was also an intimate friend of Mr. *Morgan*. That letter was not produced in the cause, but the purport of it appears, from Mr. *Beauchamp's* letter of the 11th of August, to have been to obtain the advance of 10,000*l.* (b)

Mr. *Morgan*, aware that the security of Mrs. *Whitton* was necessary to enable him to obtain the money, instructed Mr. *Charles Morgan*, one of his sons, then a

(a) *Vide infra*, p. 340.

(b) *Vide infra*, p. 337.

clerk in the office of Mr. *Gregson*, the solicitor of Mrs. *Whitton*, to prepare a bond in the names of *William Morgan* and Mrs. *Whitton*, as the obligors for securing the said sum, and to leave blanks for the name of the obligee, and the rate of interest to be reserved. Mr. *C. Morgan*, pursuant to these instructions, prepared and engrossed a bond as follows :—

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“ Know all men by these presents, that we, *William Morgan*, of *Colneyhatch*, in the county of *Middlesex*, esquire, and *Mary Philippa Whitton*, of *Stonewall*, in the parish of *Chiddingstone*, in the county of *Kent*, widow, are held and firmly bound to

in the penal sum of 20,000*l.* of good and lawful money of *Great Britain*, to be paid to the said

, his certain attorney, executors, &c., for which payment, &c., we bind ourselves jointly, and each of us separately, &c., by these presents, sealed with our seals, dated this                      day of                      1833.

“ Whereas the said                      , at the request of the said *William Morgan*, agreed to lend him the sum of 10,000*l.*, and upon the treaty for the said loan it was agreed that the repayment thereof should be secured by the joint and several bond of the above bounden *William Morgan*, and of *Mary Philippa Whitton* as his surety, in a sufficient penalty, at the time and in the manner mentioned in the condition hereunder written : Now, the condition of the above-written obligation is such, that if the said *William Morgan* and *Mary Philippa Whitton*, or either of them, their or either of their heirs, executors, or administrators, do and shall well and truly pay or cause to be paid unto the said                      , his executors, administrators, or assigns, the sum of 10,000*l.* of lawful money of *Great Britain*, on or before the day of                      , which will be in the year 1834, with interest thereon, in the meantime, after the rate of for every 100*l.* by the year, by equal half-yearly

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payments, &c., then the above-written obligation void, otherwise to be and remain in full force and

This instrument was signed, sealed, &c., by “*Morgan*” and “*Mary P. Whitton*,” in the presence of “*Charles Morgan*, 18, *Bedford-row*, *London*” and “*Samuel Tinkler*, servant to *Mrs. Whitton*.”

On the 10th of *August*, 1833, *Mr. William Morgan* with his son *Charles*, went to *Mrs. Whitton's*, at *St. James's*, taking with them the bond ; and in the interview which he then had with her, apart from his son, he stated to her that he alleged in his answer, that the object of his visit was to procure her execution of the bond, to enable him to raise the 10,000*l.*, and his confident expectation that *Mr. Morgan* would lend him that sum upon her joining in the bond, whereupon she expressed her willingness to join in such a bond. On the following morning, *Sunday*, he had another interview in private with her, she having again expressed her consent to join in the bond as a security to the person who should lend him the 10,000*l.*, *Mr. Charles Morgan* was then called into the room, and desired by his father to read aloud the engrossment of the bond preparatory to the same being executed ; accordingly he proceeded to do so in the presence and hearing of both ; and on his coming to the blanks in the engrossment which had been left for the name of the lender, he stated to *Mrs. Whitton*, that these blanks were to be filled up with the name of the person who was to lend *Mr. Morgan* the 10,000*l.*, and would be filled up with his name when the money was advanced, or to that effect ; and on his coming to the other blank, he stated to her that the same was to be filled up with the rate of interest to be made payable on the bond, which would also be afterwards filled up. After he had read the whole of the engrossment, he explained to her the nature of the liability she would incur by executing the same, and that if the amount to be secured by the bond was 1

by Mr. *W. Morgan*, she would be liable for the same ; and he made use of this expression, " The effect of which is, that if my father cannot pay, you must." The bond was then executed with the blanks.

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On the 12th of *August*, 1833, Mr. *Beauchamp's* reply to the application made to him on the 9th, was received in *London* by Mr. *John Squire*. It was as follows :—

" *Walford House*, 11th *August*, 1833.

" My dear *Squire*,—Your letter of the 9th has completely upset me. I am indeed grieved beyond measure. What a distressing circumstance for poor Mr. and Mrs. *Morgan*, who deserve a better fate. You say that you and *Rothschild* have agreed to lend him each 5,000*l.*, and I will with much pleasure do the same, provided you take care to see me perfectly secure. You say his friend Mrs. *Whitton* will join in a bond, or give a mortgage, which I doubt not is quite good ; but you must ascertain if the property is at her own disposal and unencumbered, and if so, I would even advance the 10,000*l.*, provided he cannot procure it through any other channel, first, on bond, because you say there is not time to prepare the mortgage, and afterwards on mortgage, at four and a half per cent. Recollect, I propose to lend stock, and not money, and for this reason, because I intend you to sell as much of the trust stock as you may require for this purpose. Of course the mortgage must be taken in your name and that of poor *Morgan*. Upon the first blush of the thing I had made up my mind to go to town, but I have had so much gout in my foot lately, that I do not feel quite equal to the journey, not being able to wear a boot. Do pray tell him this, and say how very much both Mrs. *Beauchamp* and myself feel for him and Mrs. *Morgan*. Recollect the trust stock stands in the joint names of yourself and *Morgan*. As a proof that Mrs. *Beauchamp* with myself is anxious to assist them at this critical moment, she will add her sig-

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nature to this letter, acquiescing in the sale of part of the trust stock, relying on your friendship and care in seeing the security is what it ought to be. Do pray let me hear from you very soon. I am so anxious, and feel so much for him, that I shall not be at rest until I know everything is made straight. With our united regards to all your circle, I remain yours, &c.,

"R. F. Beauchamp,

"Eliz. Beauchamp."

The trust stock alluded to in this letter consisted of two sums of 10,000*l.*, 3*l.* per cent. consols, comprised in the marriage settlement of Mr. and Mrs. *Beauchamp*, one of which sums was then standing in the bank books in the joint names of *Richard Williams*, deceased, the appellant *John Squire*, and the said *William Morgan*; and the other in the joint names of the same *Morgan, Williams*, and *Squire*, who were the trustees of the settlement. (c)

Mr. *Squire*, upon receipt of the letter, directed so much of the stock to be sold as produced 10,000*l.*, and that sum

(c) The trusts of the settlement were, as to one sum of 10,000*l.* consols, settled by Mr. *Beauchamp* himself, to pay to him the dividends for his life, and after his death, if the wife should survive him, to her for life; and as to the second sum of 10,000*l.* consols, settled by *J. Westbrook*, the lady's father, to pay the dividends according to her appointment, and in default of appointment, to her separate use for life; and after her death, if Mr. *Beauchamp* should survive her, to him for life. The trusts of the capital of both sums after the death of the survivor of Mr. and Mrs. *Beauchamp*, were for the benefit of the issue of the marriage; and in default of issue (which was the event), the 10,000*l.* settled by Mr. *Beauchamp* was, after the death of the wife, to revert to him absolutely, and the other sum of 10,000*l.* was to be held in trust for Mrs. *Beauchamp* absolutely, if she survived her husband, and if she died in his lifetime, then subject to a power of appointment, which she was thereby empowered to exercise by deed or will, and, in default of such appointment, in trust for Mr. *Beauchamp* absolutely.

was paid to Mr. *W. Morgan*. This took place on the 14th of *August*, 1833. The money was raised by sale of the whole of one of the said sums of 10,000*l.* consols, and of 1235*l.* 19*s.* 1*d.*, part of the other sum. The bond, as executed by Mrs. *Whitton*, was on the receipt of the money handed over by Mr. *W. Morgan* to Mr. *Squire*, who afterwards filled up the blanks for the name of the obligee, by inserting the name of *Robert Farthing Beauchamp*. Mr. *W. Morgan* regularly paid the interest which accrued due thereon to the bankers of Mr. *Beauchamp*, to the credit of his account.

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Mr. *R. F. Beauchamp* died in *January* 1841, having by his will appointed the appellants his executors, who shortly after his death proved the will, and in the month of *August* then next ensuing they applied to Mr. *Wm. Morgan* to repay the 10,000*l.*, and on discovering his inability to do so, application was made to Mrs. *Whitton* by letter from *John Squire*, dated *Nov.* 10th, 1841, saying :

“ Mrs. *Beauchamp* having called on the trustees of her marriage settlement to reinstate, before the end of this month, the stock which is at present represented by your bond to her late husband for 10,000*l.*, I am under the necessity of applying to you for the discharge of the same, together with interest, from 5th of *July* last, up to which period it has been paid by Mr. *Morgan* ; and you will oblige me by letting me know when it will be convenient for you to enable me to carry Mrs. *Beauchamp*’s wishes into effect.”

In consequence of this application, Mrs. *Whitton* consulted Mr. *Gregson*, her solicitor, and in the correspondence which then took place between him and *John Squire*, the appellants were apprised of the legal invalidity of the bond. They then filed their bill against *W. Morgan* and Mrs. *Whitton*, praying “ that it might be declared by the decree of the Court, that Mrs. *Whitton*, as well as *W. Morgan*, was liable to pay to the appellants, as

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such executors as aforesaid, the said sum of 10,000*l.*, together with the interest due and to grow due thereon at the rate of 4*l.* 10*s.* *per cent. per annum*; and that it might be also in like manner declared that the said bond so executed as aforesaid was valid and ought to be enforced in equity against Mrs. *Whitton*, as well as *W. Morgan*, or otherwise that Mrs. *Whitton*, together with the said other defendant, might be decreed to execute to the appellants, as such executors as aforesaid, a good and valid joint and several bond for the said sum of 10,000*l.* and interest thereof, at the rate aforesaid, in the place of the said other bond; and that at all events Mrs. *Whitton*, as well as the said *W. Morgan*, might be decreed to pay the appellants, as such executors as aforesaid, the sum of 10,000*l.*, together with the interest due and to grow due for the same, at the rate aforesaid, and that all necessary and proper accounts might be taken," &c.

Mrs. *Whitton*, by her answer to the bill, stated, among other things, that in *August* 1833, she, then being of the age of seventy years or thereabouts, and being upon terms of intimate friendship with, and having great confidence in, *W. Morgan*, who was a co-executor with her of the will of her late husband, and took an active part in the administration of his affairs, received from him a letter (the letter of the 7th of *August*, 1833, before set out); that her memory being somewhat impaired by age, she did not, at that distance of time, distinctly recollect whether she made any, or what answer, to the said letter, or what was the purport of such answer, if any; however, she believed that she (believing his representations contained in the said letter to be true, and that her compliance with his request was only a matter of temporary arrangement, and would not subject her to any real or permanent liability, and having entire confidence in him), did, in some manner, intimate to him that she would comply with his request; and she admitted, that *W. Morgan*, together with his son

*Charles*, came to her, at her house at *Stonewall*; and, from reference to a diary then kept by her, she believed that they so came to her on the 10th of *August*, 1833, and that they left her the succeeding day; and she stated, that in the course of such visit, the said bond, having such blanks therein as in the bill stated, was produced by *W. Morgan*, and presented to her for execution, but she could not, from failure of memory, speak positively as to the particular circumstances which took place on the occasion; she, however, believed that *W. Morgan* might, upon presenting the bond for execution, have told her that the blanks therein would be filled up, when the money (meaning the 10,000*l.*) was advanced; and, speaking to the best of her recollection, she believed and admitted, that in the course of the visit the bond was produced and presented to her for her execution by *W. Morgan*, and she did sign and seal, and, as her act and deed, deliver the same with such blanks therein as aforesaid; and she admitted that the bond, upon being so executed by her, was taken away by *William* and *Charles Morgan*, to *London*, for the purpose, as she supposed, of being handed over to the person who should advance the said sum of 10,000*l.* to *W. Morgan*, as a security for that sum and the interest; she also admitted, that *W. Morgan* afterwards told her that Mr. *Beauchamp* had lent him the 10,000*l.*; that subsequently to the time when the bond was executed by her, and prior to the month of *November* 1841, she had many interviews with *W. Morgan*, and that in the course of such interviews she frequently adverted to the subject, and requested him to realise his securities, and to make the other arrangements alluded to in his letter of the 7th *August*, 1833, for the purpose of bearing her harmless, according to his promise, from whatever liability she might have incurred by joining in the bond, and she believed that in some of such conversations *W. Morgan* told her that he had paid the interest due on the 10,000*l.* to Mr. *Beauchamp*, as the obligee in the bond,

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and that no part of the principal sum had been paid by him ; and she stated, that *W. Morgan* had been in the habit of representing to her, that some time in the year 1826 he had advanced the sum of 4,000*l.* on behalf of *Richard Whitton*, deceased, the son of her late husband *William Whitton*, in order to extricate him from difficulties in which he had been involved, and that she intended to make good such sum of 4,000*l.* to *W. Morgan* at her death ; and she believed that she inquired of him whether, if she provided the said sum of 4,000*l.*, it would enable him to pay the said alleged debt (meaning the said bond debt) ; but, except as aforesaid, she denied that she ever offered to pay any part of the principal sum to Mr. *Beauchamp*, or ever meant to admit her liability to pay it.

*W. Morgan* in his answer stated facts, to the effect before stated. Numerous witnesses were examined, the substance of whose evidence is comprised in the judgment of the Vice Chancellor of *England*, before whom the cause was heard in *May* 1844, when his Honour decreed that the bill should stand dismissed as against Mrs. *Whitton*, with costs ; and that the defendant, *W. Morgan*, should pay to the appellants, as executors of Mr. *Beauchamp*, the sum of 10,000*l.*, together with interest thereon, from the 12th of *August*, 1841 ; and also the costs of the suit, together with what the appellants should pay to Mrs. *Whitton* for her costs. (a)

(a) The following are extracts from the short-hand writer's notes of the judgment, printed in a joint appendix to the appeal cases, and admitted on both sides to be correct :—

The *Vice Chancellor*.—I have considered this case very deliberately, and attended to all the evidence, and the statement in the bill and in the answers, and it does appear to me that it is much to be lamented the transaction originally was set on foot without the intervention and advice of Mr. *Gregson* ; for my belief is, that if that gentleman had been advised with, what I will call the subsequent calamitous events would never have happened. It ap-

*W. Morgan's* circumstances making it impossible to have the benefit of the decree against him, the appeal was brought against so much of it as dismissed the bill with costs as against Mrs. *Whitton*.

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pears to me to be a very hard and cruel case on Mrs. *Whitton*. I cannot think that she has been quite fairly dealt with ; and when I use that expression, I desire that it may be taken with every possible modification which may arise from this consideration, which I believe is founded in fact, that the parties who were dealing with her, one and all, were not exactly aware of what they were about, and that they did not understand the grounds on which they proceeded.

The opinion that I have formed on the case is quite irrespective of any question that may arise as to whether the bond being void at law might not, as an agreement, have operation in equity, because I apprehend such a general proposition cannot be disputed ; and not only could a bond that was void at law have operation in equity as an agreement, but a bond good at law, and having a definite form at law, may nevertheless be taken in equity as evidence of an agreement far beyond what is expressed in the condition ; and the case to which I alluded during the argument, and which afterwards went to the House of Lords<sup>(a)</sup>, is decisive on that point. But the circumstances of this case are very peculiar. (His Honour stated them as above, p. 334, *et seq.*, and proceeded.) Now, there is a distinct statement made by Mr. *Morgan*, that if Mrs. *Whitton* would assist him in the way proposed, he would save her harmless ; and what answer she wrote we do not know ; probably she answered by return of post ; in consequence of which letter, if it was written on the 8th, it would come to town on the 9th, and would therefore most probably give rise to that letter of the 9th which was written by Mr. *Squire* to Mr. *Beauchamp*, and which is noticed in Mr. *Beauchamp's* letter, by its allusion to the date. What the letter was, we do not know. Then Mr. *Beauchamp* writes the letter of the 11th of *August* to Mr. *Squire*. Now, with reference to that and to another circumstance that occurred in the cause, inasmuch as the cause turns mainly upon the deed of settlement, I requested that I might be furnished with that settlement, or a copy of it ; and I have had an abstract of the settlement

(a) *Logan v. Weinhold*, 1 Clark and Finnelly, 611.

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After the appeal was lodged, *W. Morgan* died in and the suit in Chancery and the appeal were against his administrator, *ad litem*, who however appear to the appeal.

and the original itself. It appears that there was a set made, of what I will call the two sums of 10,000*l.* consols in a given event, were to go in a different manner ; (*supra*, p. 338.) This is to be observed, that there was of sale of the stock given to the trustees, with the in writing, of Mr. and Mrs. *Beauchamp*, and the trust for with the proceeds was to invest them in either Government or real securities. Now, Mr. *Beauchamp* writes this letter adverting to that power in the settlement. (His read the letter, *supra*, p. 337.) It is manifest to me that what Mr. *Beauchamp* meant was that there should be some security taken. This also is evident, that inasmuch as the letter was written on the 11th to Mr. *Squire*, and as Mr. *Morgan* in pursuance of what passed between him and Mrs. *Whitton* with his son to her on the 10th, and was with her on the 11th, the contents of this letter could not have been communicated to him, and the reasonable presumption is, that though he was not aware of what had been passing in the mind of Mrs. *Whitton* did not on the 11th know the contents of this letter. As to what passed between Mr. *Morgan* and Mrs. *Whitton* it is impossible to tell ; there is no evidence upon it, except so far as there may be considered evidence, which appears, not in a very satisfactory form, in the evidence of Mr. *Charles Morgan*, because it strikes me that there was a slight inconsistency. The consequence therefore is, that the only representation that we have in evidence of what was stated by Mr. *Morgan* to Mrs. *Whitton* is his own letter of the 10th of August, in which he states, that he asked for assistance, and that he wanted time to realise his securities, and that she might upon it he would save her harmless. Well, then, it appears that this bond did pass from the hands of Mr. *Morgan* to Mr. *Squire*. As we have no evidence to show the time when it was transmitted, and how or what was the representation, if there was an accompanying the transmission of the bond ; but it must have passed into Mr. *Squire's* hands, because Mr. *Squire* himself filled the blanks in his own handwriting ; and the other part of the

Mr. *Kindersley* and Mr. *Stuart* (Mr. *Toller* was with them) for the appellants :

There is distinct evidence, by the respondent's admissions in her answer, as well as by the recitals in the bond,

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action is this, that though the bill proceeds to state that the stock was sold and the proceeds paid to Mr. *Beauchamp*, and that then Mr. *Beauchamp* advanced the money to Mr. *Morgan*; the real fact appears to have been, that the whole use of the money was effected without the personal intervention of Mr. *Beauchamp* at all. Mr. *Morgan* was the stock-broker, and the stock virtually stood in the names of Mr. *Squire* and Mr. *Morgan*, for the difference between the husband's stock and the wife's stock is determined by the position of the three names in which the stock stood. Well, therefore, no person was necessary for the actual making of the sale except Mr. *Squire* and Mr. *Morgan*; and a sufficient quantity of the stock was sold to produce the sum of 10,000*l.*, which, by the ordinary course of the transaction, as I presume, Mr. *Morgan* would have received.

It appears that Mr. *Morgan*, from time to time, paid the interest into the bankers of Mr. *Beauchamp*, upon whose death his executors, the plaintiffs, conceiving that his estate was bound to the trustees, discharge the debt which they thought was so due from the estate of Mr. *Beauchamp* to the trustees, by purchasing in the names of the trustees a sum of stock equivalent to that which had been sold out, and then they file their bill. That bill represents the transaction as one in which the money was paid by the trustees to Mr. *Beauchamp*, and then by Mr. *Beauchamp* lent to Mr. *Morgan*; that is the statement on the bill.

It occurred to me that it was the duty of Mr. *Squire*, and, of course, of Mr. *Morgan*, to have taken care that they followed the authority given to them by Mr. *Beauchamp*, which clearly was an authority not to take, and rely on, a bond; but if they took a bond at all, to take it as the first thing, and then to obtain a mortgage security; but they do not do that, and it is perfectly true that the authority which was signed (that is, the letter of the 11th of *August*), by Mr. and Mrs. *Beauchamp*, would authorize the trustees to sell; in that there was no breach of trust, but the breach of trust was actually made in not doing the very thing which Mr. *Beauchamp* had directed Mr. *Squire* to do, namely, to

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as executed by her, that she agreed to join Mr. *Morgan* in a bond to secure the re-payment of 10,000*l.* with interest to the person, whosoever he might be, who should advance that sum to *Morgan*. Although she does not re-

see that the security was sufficient, to see that it was unencumbered, and to see that Mr. *Beauchamp* was made secure by a mortgage in their names; and when the executors thought proper to pay what they conceived to be the debt of Mr. *Beauchamp* to the trust fund, the question is rather, whether Mr. *Squire* was not in effect doing this, applying the fund which he and his co-executor had, as executors of Mr. *Beauchamp*, in shielding himself and Mr. *Morgan* from the consequences of their own breach of trust. As the fact now stands, there was no original debt from Mrs. *Whitton* to Mr. *Beauchamp*, because the real transaction was that the trust fund, as Mr. *Beauchamp* understood it, was to make the advance; but the trust fund was to be indemnified by the mortgage which Mr. *Squire* was to obtain.

It appears to me that, inasmuch as this is a claim by means of the equity, which was obtained by having the bond filled up by Mr. *Squire*, which manifested the agreement, such as it was, that Mrs. *Whitton* had made; that those who take the agreement, take it affected by the equitable circumstances under which it was made; and one of the inducements to Mrs. *Whitton* to give the security, such as it was, unquestionably was the promise in the letter of the 7th of *August*, that Mr. *Morgan* would see her indemnified. Now, I should like to know whether, if it had been stated to Mr. *Beauchamp* that Mrs. *Whitton* never meant herself to be the person who should pay him, but that she relied on the representation made by Mr. *Morgan*, that he would indemnify her, whether the transaction, as far as Mr. *Beauchamp* or his executors were concerned, is not affected by the equitable notice of that indemnity, the promise of which was the sole inducement, as far as the evidence goes, to Mrs. *Whitton*, to give the security in the form in which we find it.

It seems to me that Mr. *Squire* and Mr. *Morgan*, cannot, as the executors of Mr. *Beauchamp*, claim a right to be indemnified, when, in point of fact, they have not fulfilled the instructions of Mr. *Beauchamp*, and the estate of Mr. *Beauchamp* has come into a situation that there may be a question whether the payment

collect all that passed in the conversations between herself and Mr. *Morgan* on the 10th of *August*, 1833, she does not deny that she agreed to become surety for him. She admits that the instrument, signed and sealed by her,

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made by his executors to the trust fund is one that they can maintain against the parties entitled to his personal estate, of which I know nothing. It appears to me that Mrs. *Whitton* was not properly dealt with ; for my opinion is, that she ought to have been told at the time that the bond was proposed to be executed, that it was, as it stood, waste paper, and that in order to make herself bound, without question, it would have been necessary that she should give some other security than that ; instead of which she is allowed to do as she did, without the intervention of her solicitor ; without a due explanation, as I take it ; for *C. Morgan*, by the transaction as he represents it, shows that he was not capable of explaining the matter, and did not explain it.

I think the case has been mistaken on the pleadings. The case that is proved, is not the case that is alleged. You may argue about it, and say that it comes to the same thing ; but then it is the argument that is to give the identity, and about the argument people may differ ; the facts of the case are totally different ; and I cannot but think that, without imputing moral blame to these parties (who are ignorant, as it appears, of law, who were ignorant of their duty as trustees, who seem not to have thought that to an aged lady it was at least due that she should be protected by the advice of her solicitor), that the whole thing was done in a hurry for the sole purpose of assisting Mr. *Morgan*, who made representations which turned out not to be true, and the assertion of which has given rise to the whole transaction ; and it really does appear to me, that the only thing that I can do is to dismiss the bill with costs, as against Mrs. *Whitton*.

There is one thing I wish to observe, in case this should go further, and that is this ; on reading over that mass of letters which were handed up to me ; in the letter No. 9, there certainly are statements made which lead one to infer that, supposing there had originally been a perfectly good liability on the part of Mrs. *Whitton* as surety, the liability was discharged by Mr. *Beauchamp*

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was taken away by Mr. *Morgan*, for the purpose of being handed over to the person who should advance him the 10,000*l.*, as a security for that sum; and it is proved that it was so handed over, and that the money was advanced by Mr. *Beauchamp* on the faith of the instrument so executed by her, and on the faith of her agreement, to be surety for its repayment.

It appears quite clear from Mr. *Beauchamp's* letter of the 11th of *August* to Mr. *John Squire*, that he would not lend the money without the security of the respondent, by bond first, and mortgage afterwards. The circumstance, that no mortgage was obtained or asked from her, as originally contemplated by Mr. *Beauchamp* in that letter, cannot diminish her liability, if the money was advanced, as it certainly was, on the faith of her agreement to join as surety for its repayment, that agreement being admitted by her, and proved against her.

Although the bond turned out to be invalid at law, it is, nevertheless, as connected with the admissions and proofs in this case, a good agreement, under hand and seal, and such as a court of equity can enforce; *Crosby v. Middleton (a)*, *Nurse v. Frampton (b)*. It was an agreement entered into by the respondent deliberately, as an act of friendship towards Mr. *Morgan*, and his failure to save her harmless, as he had promised, is no sufficient reason for absolving her from her act, on the faith of which another party advanced his money.

The *Vice Chancellor's* decree, proceeding on the view giving time to Mr. *Morgan* without her knowledge. That was a letter written by Mr. *Squire*, the 26th of *November*, 1841, to Mr. *Gregson*; it is not on the pleadings, but if this case is carried farther it might be a consideration whether some inquiry should not be directed in respect of it, and any one will read it and consider whether, if the statement be true, time was not given by Mr. *Beauchamp* to Mr. *Morgan*.

(a) Prec. in Ch. 309.

(b) 1 Salk. 214.

that the respondent executed the instrument on the understanding that she would never be called upon for payment, is clearly a miscarriage, as that doctrine, if admitted, would put an end to suretyship altogether. It cannot be said that there was any misrepresentation, or any surprise practised on this lady: it is admitted that she was a woman of strong mind and conversant with business, having acted for several years as executrix of her husband. It would have been better, certainly, if her solicitor had been present or consulted on the occasion, if the urgency of *Morgan's* affairs could admit of delay; but no suspicion can arise from his absence, or from his not being consulted, to lessen or affect the binding obligation of the instrument executed by her. It is not quite certain that Mr. *Gregson* was then her solicitor: she had, some time before, employed another solicitor to draw her will. The answer of Mr. *Morgan*, and the evidence given by his son, shew that everything material for her to know was explained to her, and that she perfectly understood the nature and extent of the obligation—that if “*Morgan* could not pay, she must.” It never occurred to her that she was not liable, until apprised of the legal flaw in the bond; for she admits in her answer that she intended to leave Mr. *Morgan* 4,000*l.* by her will, to compensate him for losses he had sustained by assisting Mr. *Whitton's* son, and that she would pay him that sum in her lifetime if it would rid her of all liability in respect to the bond.

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The defences set up to this claim on the Statute of Frauds and Statute of Limitations are not available. It is a sufficient answer to the first that this is an obligation or contract in writing; and being an instrument under seal, the second does not apply. In *Crosby v. Middleton* it was said, “forty-nine years was not sufficient time to ground presumption in equity;” and although Mrs. *Whit-*



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*ton* was joined only as a surety with *Morgan*, she was severally liable; *Rawstone v. Parr* (b).

It may also perhaps be argued on behalf of the respondent here, as it was in the Court below, that Mr. *Beauchamp* or his personal representatives were not the proper parties to sue, for that the money was advanced, not Mr. *Beauchamp*, but by the trustees of his marriage settlement, *Morgan* himself, the borrower, being one of them. But the 10,000*l.*, although produced by the sale of the trust stock, was lent by and on behalf of Mr. *Beauchamp*, and not by the trustees, and the debt contracted by *Morgan* was contracted by him to Mr. *Beauchamp*, and not to the trustees. Mr. *Beauchamp's* letter shews that he was the lender, and that he and the trustees always considered him to be the creditor is further proved by *Morgan's* payments of the interest to his account at his bankers'.

Mr. *Turner* and Mr. *Wigram* (Mr. *Baily* and Mr. *Jackson* were with them) for the respondent :

The only agreement into which Mrs. *Whitton* entered was the agreement contained in the bond. The bond is void in law, there being no obligee; and it is void also as an agreement, there being no second contracting party. In *Laythoarp v. Bryant* (c), Chief Justice *Tindal* states the law thus : "An agreement is not perfect unless in the body of it, or by necessary inference, it contains the names of the two contracting parties, &c." That is a clear proposition : it is equally clear that a Court of Equity will not enforce a void instrument beyond its legal operation, especially against a mere surety, by construing it to be an instrument of a different nature, and binding on the party another way; *Sheffield v. Lord Castleton* (d), *Simpson Field* (e); there being no ground to infer mistake in the

(b) 3 Russ. 424, and 539.

(c) 2 Bing. N. C., 742.

(d) 2 Vern. 393.

(e) 2 Cas. in Ch. 22.

ture of the instrument, and no previous equity in the party seeking to enforce it; *Sumner v. Powell* (b), *Hebblewhite v. M' Morine* (c), *Clarke v. Bickers* (d). The alleged bond is also, both upon the principle of the authorities and the Statute of Frauds, void as a guarantee for the debt of *Morgan*, as not being complete at the time when it was executed; *M' Iver v. Richardson* (e).

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The case of *Crosby v. Middleton* (f), cited for the appellants, turns out, upon comparing the reports of it with the registrar's book, not to have any application to this case. There was fraud in that case, there is none in this.

The trustees of Mr. and Mrs. *Beauchamp's* settlement were themselves the parties who advanced the money to one of themselves; and this suit, though instituted in the name of *Beauchamp's* executors, was really for the purpose of protecting *Squire*, the surviving trustee of his settlement, against the breach of trust committed by him and *Morgan* in selling out the trust fund. That was the real object of the suit, and such was the view taken of it by the Vice Chancellor,—whose judgment in all its parts it is not necessary to defend. The suit, if maintainable at all against the respondent, ought to have been brought in the names of the trustees.

At the time when the bond was executed, the respondent had no reason to believe, either from the form of the instrument or the representations made to her, that the loan of money to *Morgan* was intended to be made by himself and his co-trustee, and therefore she was misled as

(b) 2 Mer. 30; Tur. & R. 423.

(e) 1 Mau. & S. 557.

(c) 6 Mees. & W. 200.

(f) Prec. in Chan. 309; and

(d) 14 Sim. 639.

2 Eq. Cas. Ab. 188.

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to the real nature of the intended transaction, and her position and liability as a surety.

The Courts would not enforce even a valid bond against a surety unless satisfied that all necessary explanations of the nature of the transaction had been given him before he entered into the bond. The non-communication of any fact within the knowledge of the party obtaining the bond, and material for the surety to be acquainted with, is undue concealment, and releases the surety; *Pidcock v. Bishop* (f), *Stone v. Compton* (g), *Railton v. Mathews* (h), *Davidson v. Cooper* (i).

If Mrs. *Whitton* had been informed that the money was to be advanced out of a trust fund by *Morgan* himself, one of the trustees, would she not naturally object that he would not, of course, enforce the bond against himself, the principal, but that she, the surety, would have to pay it? Again, if she had been informed that the security was to Mr. *Beauchamp*, would she not reasonably say, "Why should I be surety for *Morgan* to *Beauchamp* who is more the friend of *Morgan* than I am?" She, on the other hand, did no act to enable *Morgan* to deceive his co-trustee or *Beauchamp*. They knew that the bond was imperfect: they were not misled by any one, but had full knowledge of all the circumstances.

Mr. *Kindersley* in reply :

The truth and honour of the case are with the appellants, while on the other side, an ingenious argument is raised upon the technicalities of the law. It was impossible to inform Mrs. *Whitton* of the name of the obligee at the time of executing the bond, because it was not then known by whom the money would be advanced. It was proposed to her to be surety for *Morgan*, and to that pro-

(f) 3 Barn. & C. 605.

(g) 5 Bing. N. C. 142.

(h) 10 Clark & Fin. 934.

(i) 13 Mees. & W. 343.

posal she agreed. It was immaterial to her to know by whom or out of what fund the money was to be advanced; and therefore the cases cited upon the non-communication of all the circumstances are not applicable to this case, which must be governed by the principle of *Crosby v. Middleton*, a case not in the least invalidated by *Sheffield v. Lord Castleton* (k), or the other cases referred to on the other side (l).

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The *Lord Chancellor*.—The object of this appeal is to reverse a decree of the Vice Chancellor of *England*, dismissing the appellants' bill, he being of opinion that they had not made out such a case against Mrs. *Whitton* as would justify him in granting the relief prayed.

The case set up by the bill was that Mrs. *Whitton* was indebted in the sum of 10,000*l.* to the representatives of Mr. *Beauchamp*, with interest thereon at four and a half per cent., in consequence of a bond executed by her, as security for Mr. *William Morgan*, to enable him to raise money under circumstances of pressing necessity, which sum was advanced by Mr. *Beauchamp* on that security. The bill prayed that, &c. (His Lordship read the prayer).

Now this sum of 10,000*l.* was never a legal debt from the defendant, Mrs. *Whitton*, to the plaintiffs; it is not pretended that it was; but the question is, whether the circumstances which are detailed in this suit are such as make her liable to pay this sum of 10,000*l.*

It appears that Mr. *William Morgan*, who, unfortunately for Mrs. *Whitton*, was on terms of great intimacy with her, and had been a friend of her husband's, had got into great difficulties, and was under the necessity of borrowing a sum of money to make good his engagements.

(k) 2 Vern. 393.

(l) *Ante*, pp. 350, 351.

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Mr. *Morgan*, it appears, and Mr. *Squire* were the surviving trustees of Mr. *Beauchamp's* marriage settlement, and in that character had invested, in their names, sums of money, of which the 10,000*l.* formed a part. Being pressed by the exigencies of his affairs, Mr. *Morgan* applied to Mrs. *Whitton* by a letter (which I do not find stated in the bill, although it is alluded to, but which is printed in the appellants' case), in which he represents to her his situation, and states that he had to make up a sum of money in seven days, and says, "in order to give me time to realise other securities, may I ask the favour of you to join me in a bond for 10,000*l.*, which will give me time to make arrangements."

No one reading this letter could possibly avoid understanding what the meaning of it was; that his object was to borrow 10,000*l.*, and that he wished the signature of Mrs. *Whitton* to a bond for 10,000*l.*, in order to facilitate the raising of that sum of money. What Mrs. *Whitton's* answer was, does not appear: she could not recal to her recollection the circumstances, in consequence of the failure of her memory, she being seventy-nine years of age when she put in her answer to this bill. Whether a letter in reply was returned she does not know, but her statement in her answer is, that she in some way or other expressed her wish to comply with the application that had been made.

It happened that Mrs. *Whitton* had for her solicitor a respectable gentleman (Mr. *Gregson*), who had been a great friend of her husband's, and who managed her concerns after her husband's death; and it happened, unfortunately for her, that a son of Mr. *Morgan* was a clerk in that gentleman's office, and that instead of Mr. *Morgan* desiring her to consult her solicitor, he sent his own son, a clerk in that solicitor's office, down to Mrs. *Whitton* for

the purpose of carrying the transaction into effect, for his own individual benefit. As to what passed between them on this occasion we have only the information given us by his son. The result, however, was, that in the very office of Mr. *Gregson*, and without his knowledge, was prepared this document by young Mr. *Morgan*, not as Mr. *Gregson's* clerk, on which the plaintiffs seek to recover this money, but which was wholly and entirely inoperative,—because, though in the form of a bond executed by Mrs. *Whitton*, it is a document in which she covenants with some person, whose name is not mentioned, as the obligee of the bond, to make good and pay the 10,000*l.* The very foundation of the plaintiffs coming to a Court of Equity is that the instrument is invalid at law, as being a contract under seal, to which there is only one party, that is the party contracting to pay, but with blanks for the name of the person with whom the contract is made; therefore it is an instrument entirely void at law. This bond so made, got, as naturally it would, into the hands of Mr. *Morgan*, with blanks in it for the name of the obligee and the rate of interest on the principal sum.

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The next transaction we find passing is, not a letter from Mr. *Morgan* to Mr. *Beauchamp*, but the answer of Mr. *Beauchamp* to a letter of Mr. *Squire*, which letter is not produced. As the bill was filed by the executors of Mr. *Beauchamp*, Mr. *Squire*, who is one of them, would naturally be in possession of any letter written to *Beauchamp* by *Morgan*; but there is no such letter produced, although the transaction was one which, as appears by the answer, had much engaged his attention. We have that answer, to the letter of Mr. *Squire* by Mr. *Beauchamp*, dated the 11th of *August*; the bond bearing date the 12th. It is said, though it was actually executed on the 11th, being *Sunday*, it bears date on the 12th, *Monday*. I think

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much importance is attached to that date in this way:—  
*Beauchamp* wrote the letter on the 11th ; he could not, therefore, have had a knowledge of the document which *Morgan* had obtained from Mrs. *Whitton* the same day. In this letter of Mr. *Beauchamp*, dated the 11th of *August*, from *Somersetshire*, he says, “Recollect, I propose to lend stock, and not money, and for this reason, because I intend you to sell as much of the trust stock as you may require for this purpose,” which proves to demonstration that the *cestui que trust* of the settlement must have been entirely ignorant of Mrs. *Whitton's* having put her hand and seal to an instrument for the purpose of inducing him or any one else to advance the money, because he speaks prospectively of what may hereafter take place, and not of a transaction that had already taken place. “Recollect the trust stock stands in the joint names of yourself and *Morgan*. As a proof that Mrs. *Beauchamp* with myself is anxious to assist them at this critical moment, she will add her signature to this letter, acquiescing in the sale of part of the trust stock, relying on your friendship and care in seeing the security is what it ought to be.” [His Lordship read the letter, *ante* p. 337.]

Now this has been relied on by Mr. *Kindersley*, as proving that the original proposal by Mr. *Morgan* was that Mr. *Beauchamp* himself should advance the money. It appears to me to prove very strongly the contrary. There is not any allusion in his letter to the effect that he was personally to advance the money. If he had been asked to advance the money, he would have said, “You ask me to advance the money, I have not got it, but there is another mode in which it may be raised out of the trust fund.” The plaintiffs ought to have been in possession of the letter of the 9th, to which this is an answer on the 11th, which does not allude to any advance by *Beauchamp*

personally, but proposes to sell a part of the trust fund in order to raise the 10,000*l.*; and therefore the natural inference is, that in the letter to which this is an answer, the proposition of Mr. *Morgan* was merely to do what is suggested, and not that Mr. *Beauchamp* himself should advance the money. It is not unlikely that Mr. *Morgan* who had no scruples in committing a breach of trust in selling the trust property, the moment Mr. *Beauchamp* consented, should himself have been the author of the suggestion, as a ready means of furnishing the money of which he was in want, and he was not likely to meet with any great impediment from his colleague Mr. *Squire*; he indeed also consented, and the stock was sold, and I conceive so far from its being proved that it was the intention of Mr. *Beauchamp* to advance this money himself, and himself only to be a creditor, there is every reason to suppose (though it is not proved, except so far as there is an inference from the letter) that from the beginning to the end there was no intention of raising the money except by a breach of trust so to be committed by Mr. *Morgan* and Mr. *Squire*.

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However, this breach of trust was committed, and it does not appear that any communication on the subject was made to Mrs. *Whitton*; but the money was obtained, as the evidence proved, from the trustees of the settlement, of whom Mr. *Morgan* was one, and in order to give it a better appearance than it would have had if Mr. *Morgan* had appeared both as the borrower and as the lender; and that it might not be easily detected that the whole transaction was founded on a breach of trust, machinery was resorted to for making it appear that the loan came from Mr. *Beauchamp*. But the transaction, so far as a legal obligation was created, whether the trustees were to advance the money directly to *Morgan* or to *Beauchamp* for the



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purpose of advancing it to *Morgan*, is not very material. *Morgan* was the person who prepared the paper, and Mrs. *Whitton* was to be made liable to the very extent of the fund who was the principal obligor and debtor, as the evidence proves ; and we have reason to suppose he had no intention but to give himself the trust money, and to obtain Mr. *Squire's* approbation to apply the fund at once to his own particular purposes.

It appears that nothing more was done, and no further security was obtained. This instrument is executed by Mr. *Morgan* obtains the money, the whole of which is lost by his inability to pay, and then the plaintiffs come and ask a Court of Equity as against Mrs. *Whitton* to direct that she shall be ordered to pay the 10,000*l.* and substitute for this admitted invalid bond some other security on which she may be made liable.

The first question which the House has to consider is, what is the plaintiffs' right to sue Mrs. *Whitton*? If they have any right to sue her? The second is, have they a right to say she is liable to the demand? Now the House has to ascertain what is the plaintiffs' right, either of suing on contract, or on any equity arising out of the nature of the transaction under which the defendant became responsible. The House will not give effect to this, which is an inoperative instrument, not only proved, but admitted to be inoperative as a bond; because there is no contract made with any person, and if there be an infirmity in the instrument as a bond, it equally applies to it as an agreement. For a party cannot have an agreement with the whole world; he must have some person with whom the contract is made. If that is so, the document is equally as valid as an agreement as it is as a bond; and the document therefore, as it stands, is perfectly inoperative,

amounting to any contract between the defendant sought to be affected by the demand of 10,000*l.*, and the plaintiffs by whom the claim is made.

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Then it is said, though this is not a perfect instrument or a contract as between the plaintiffs and Mrs. *Whitton*, yet there are circumstances in the case which would raise an equity against her, which would make her responsible to the party advancing the money. If he never did advance the money, if it never came out of his pocket at all, but came from the trust fund by a manifest breach of trust, the plaintiffs cannot come to a court of equity to ask for its interference against Mrs. *Whitton*, for they have shown no contract, and no equity as against her; no privity between the plaintiffs and Mrs. *Whitton* has been shewn; for the bond, which, it is said, was the inducement for advancing the money, was not made till after the letter had been written proposing the sale of the stock, which was afterwards carried into effect.

This case cannot be compared to the case of *The Duke of Beaufort v. Neeld* (a). [His Lordship stated the principle of that decision.] Here it is clear that this document was not the inducement for Mr. *Beauchamp* to advance the money, for his letter shows that he did not know of this document at the time he gave the power to advance the money. In point of fact the parties advancing the money, beyond all doubt, were Mr. *Morgan* and Mr. *Squire*; but if Mr. *Morgan* was Mr. *Beauchamp's* agent for that purpose, it is clear that having given directions to carry that into effect, he being his agent, he knew at the moment that Mr. *Beauchamp* was to be the obligee of the bond, and he knew that Mrs. *Whitton* was not bound by anything the document contained. Such being the contract, can he call on Mrs. *Whitton* to pay the money on such a docu-

(a) 12 Clark & Fennelly, 248.

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ment, which is actually void, and which he well knew was not the inducement to Mr. *Beauchamp* to advance the money, and the effect of which he well knew at the time of preparing it?

There are reasons to believe that the transfer of the stock by Mr. *Beauchamp*'s executors, was done in order to enable them to file this bill.

It is said that Mr. *Gregson* at a subsequent time had seen this bond in the hands of Mr. *Beauchamp*. The fact is not material. We are entirely without any evidence as to the time when Mr. *Beauchamp*'s name was inserted; it is admitted that the mode in which his name was introduced is such that it did not give any validity or force to the document, which was before inoperative. There is a blank left for the name of the obligee, and that, in the absence of any proof of his having advanced the money, is quite sufficient to dispose of this case, and of the right of the plaintiffs to sue in a Court of Equity. But, independently of that, the respondent has a good defence upon her own case, for upon the face of the instrument, as well as upon the whole transaction, it appears that she intended only to be a surety. That is not disputed—it is in terms admitted—Mr. *Morgan* was the principal obligor, and it is now asked that Mrs. *Whitton* should pay the whole amount as if upon a legal contract. If the bond is liable to be impeached as a legal contract, it is for the same reason invalid as an agreement. But it is possible that the bond may be supported by some parol agreement: the parol agreement must be made out. There is no doubt that Mr. *Morgan* at that time calculated upon the expectation of raising the money by a sale of the trust fund, and not by borrowing money from a third person. No doubt, when he ultimately did that, he was bound to state the fact to Mrs. *Whitton*. The letters show that Mr. *Morgan* had been entertaining the notion of sell-

ling the trust fund at that time. Nobody can read the letters and suppose that he intended to borrow the money—and, beyond all doubt, if ever that was his intention, he did not subsequently act upon it—he no longer intended to borrow the money and to give a bond as a security for repayment of it. The liability which he was under as a trustee, making those advances, was of a totally different nature from that which had been represented to Mrs. *Whitton*. If the bond had been valid he would no longer have been a party in that obligation—he was no longer the party bound as the principal debtor for the payment of the debt. Nobody could suppose that that would not destroy the act of the surety. It might have been that if Mr. *Beauchamp* had been alive and had to pay the money, it would have been a different thing, whether the party had a claim against his estate on the bond for the money which had been advanced by him as money coming from his estate, or for the money which had been advanced by the trustees.

It remains for your Lordships to say whether there is not an end of this case upon this ground, that the bill asserts as a fact that the defendant acted upon the representation made to her, and the representation made to her was contrary to the facts of the case, and that that is quite sufficient to disentitle the plaintiffs to the relief which is prayed against her. The case of *Crosby v. Middleton* (a), which was cited to your Lordships, is not at all analogous to the present case, the facts of that case being not at all similar to the present. There was an obligor and an obligee named in that case. There were parties to the deed, and the parties' hands and seals were affixed to it. That case was very different from this, and we must know more of the facts of that case, before we can come to the conclusion sought to be

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(a) Prec. in Chan. 309; 2 Eq. Cas. Ab. 188.

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drawn from it in favour of the plaintiffs in this case. Here there is an absence of the name of the obligee, which is quite sufficient of itself to invalidate the instrument. There is nothing in the contract—independently of the question of fraud—there is nothing in the position in which this matter stands that would make the defendant liable to the demand made by the plaintiffs. This case must be disposed of according to the strict rules of law. This is a claim to have a payment of the sum of 10,000*l.*, advanced to Mr. *Morgan*, arising out of a breach of trust, the 10,000*l.* being a fund over which he exercised a power which he was not justified in doing—a fact which the defendant, Mrs. *Whitton*, was not made acquainted with, and it is clear there is nothing in the transaction to attach a liability to her. Therefore I advise your Lordships to dismiss the appeal with costs.

The appeal was accordingly dismissed, and the decree affirmed, with costs.

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|------------------------------|---|--------------------|---------------------|
| WILLIAM FLEMING and others - | - | <i>Appellants.</i> | 1848.               |
| WILLIAM HOOD NEWTON          | - | <i>Respondent.</i> | Feb. 10, 11,<br>17. |

The register of protests for non-acceptance and non-payment of bills of exchange and promissory notes, established by the *Scotch* acts of 1681 and 1696, and the 12 Geo. 3, c. 72, and 23 Geo. 3, c. 18, is a public document, to which every body has a right of access, and the publication of which in a printed paper does not constitute a libellous publication. *Libel.*  
*Injunction.*  
*Interdict.*  
*Practice.*  
*Costs.*

A person whose name was upon this register, applied to the Court of Session for an *interim* interdict to prevent, so far as his own name was concerned, the publication of a copy of the register. The Court decreed for the application :

Held by the Lords, reversing that decree, that the interdict ought not to have been granted, and also that the costs in the court below should be given.

An interdict, though in form *ad interim* only, must be treated as a final judgment, and may be the subject of appeal to this House.

—♦—

THIS was an appeal against a decree of the Court of Session, by which suspension and interdict had been granted against the appellants under the following circumstances. The appellants were the directors of the Scottish Mercantile Society, and the printer to that society. The Society had been formed of merchants and traders, and its object was declared to be “to concentrate and bring together, from time to time, a body of information for the exclusive use of the the members, relating to the mercantile credit of the trading community, with the view of diminishing the hazards to which mercantile men were exposed.” The third rule of the society was to the following effect:—  
“The secretary shall collect from the general records of protests, hornings, and other records of diligences kept for *Scotland* at *Edinburgh*, the names and designations of debtors in trade, and otherwise, appearing in these records. The secretary shall likewise excerpt

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from the *Edinburgh Gazette* the names and descriptions of sequestered bankrupts, and all notices of applications for *cessio bonorum*. The whole information so collected shall be printed and forwarded monthly, or oftener, as the general committee of directors shall think proper, to each member of the society respectively." The 5th rule declared that "the information contained in the printed record, so forwarded to members, shall be confined to themselves for business purposes, and no member shall communicate or use such information for other purposes, under the penalty of deprivation of membership." The society printed the information thus obtained in a book called "The Scottish Mercantile Society's Record." This book was known among the trading community as the "Black List." The respondent had dishonoured two promissory notes for 48*l.* and for 100*l.*, and *Andrew Miller*, the payee of the same, had had them duly protested and the protests registered according to the *Laws of Scotland*.

By the act of 1681, c. 20, (a) it was directed, "that in case of any foreign bill of exchange from or to this realm, duly protested for not acceptance, or for not payment, the said protest having the bill of exchange prefixed, shall be registrable within six months after the date of the said bill in case of non-acceptance, or, after the falling due thereof in case of non-payment, in the books of Council and Session, or other competent judicature, at the instance of the person to whom the same is made payable, or his order, either against the drawer or indorser in case of a protest for non-acceptance, or against the acceptor in case of a protest for non-payment, to the effect it may have the authority of

(a) In the "acts of the Parliament of Scotland," printed by order of Geo. IV., in 1823, the number of the act in the margin of the year, 1681, is marked 86, and the number of the act in the margin of the year 1696, is marked 38. In the ordinary editions of the acts they are marked as stated in the text.

the judges thereof interposed thereto, that letters of harning on a simple charge of six days and other executorials necessary may pass thereupon, for the whole sums contained in the bill, as well exchange as principal, in form as effairs."

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By an act of 1696, c. 36, the statute of 1681 was extended to inland as well as foreign bills, but no registration was provided for by these statutes except as against the acceptor. By the 12 Geo. III., c. 72, ss. 42, 43, the provisions of the previously existing Scotch acts were extended to notes as well as bills, and to drawer and indorser as well as to acceptor; and by the 23 Geo. III., c. 18, s. 55, the previous statute was made perpetual. An act of 1617, which established the Register of Sasines, had directed that such Register "shall be patent to all the lieges," and the "act of regulations" (*a*) declared "that the Registers immediately under the clerk register's keeping, in the lower Parliament House, or any where else, be patent to all the lieges;" and then it settled the fees for searching and taking minutes. The 55 Geo. III., c. 70, regulated the keeping of the various public registers in Scotland, and the 1 & 2 Geo. IV., c. 38, provided for making indexes to them for the purpose of easy reference.

The society had in the usual manner taken a copy of the Register in which the protests for non-payment of the respondent's bills had appeared, and his name was about to be published, together with those of other persons, in the society's book, which was a mere copy of the Registers, when he applied to the Court of Session for an interim interdict to prevent the publication. The case came before Lord *Robertson* as Lord Ordinary, when his Lordship granted the *interim* interdict, and ordered the case to be reported for the opinions of the Lords of the second division of the Court of Session. The other judges were con-

(*a*) Art. 12, printed Acts of Sederunt, 1695, p. 211.



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sulted, and six of them, the *Lord President*, and Lords *Fullerton*, *Cunningham*, *Ivory*, *Wood*, and *Robertson*, thought that the interdict ought to be granted; Lords *Jeffery*, *Mackenzie*, and *Murray* were of a different opinion. When the Judges of the Second Division decided the case, the Lord *Justice Clerk* and Lord *Moncreiff* concurred in opinion with the majority of the consulted judges; Lord *Cockburn* agreed with the minority, and Lord *Medwyn* declined giving an opinion. Under these circumstances the Court decreed for the respondent. The present appeal was entered against this decree.

Sir *F. Kelly* and Mr. *Wortley* (Mr. *Gordon* was with them) for the appellants. In the statement of the facts there is no allegation of malice on the part of the appellants, nor of injury sustained by the respondent. There is, on the other hand, evidence which rebuts the presumption of malice. The extract complained of is taken from a public record, and was made for a limited purpose, and for the use of a body of persons having an interest in the contents, and for the purpose of their protection. Under such circumstances the case of *Goldstein v. Foss* (a) shows that no action is maintainable, and consequently no injunction can be maintained.

The law of Scotland gives a peculiar character to bills of exchange and promissory notes. A protest for non-payment is nearly equivalent to a judgment in the Scottish Courts, and a summary execution may issue thereon. But in order that a protest should have that effect, it must be registered under the provisions of several acts of Parliament. In *Erskine's Institutes* (b), it is said, "It is a general rule that no creditor can use diligence on his obligation without the previous sentence of a judge. But because it was thought unnecessary where the obligation was

(a) 6 Barn. and Cress. 156; (b) Bk. 2, tit. 5, s. 54.  
 4 Bing. 489.

clear, to have a formal warrant, in order to diligence, the expedient was fallen upon that most deeds should bear a clause, by which the granter consents to their registration in the books of any competent court. This registration, in consequence of the granter's consent, is in the judgment of the law a decree, as to the special effect of execution, and indeed it carries the essential character of a decree, for the deed bears to be registered by the authority of that judge in whose court it is recorded; the extract is signed by the clerk of Court, and mentions the appearance of the grantor's procurator or advocate consenting to the decree. Bills of exchange and inland bills are registered by stat. 1681, c. 20 (c); 1696, c. 36 (c); though their style admits of no clause of registration." The first of these acts is that of 1681, which relates in terms to foreign bills only; its operation was extended by the act of 1696 to inland bills. Both these acts apply to the acceptor only; but the 72 Geo. III., c. 18, s. 42, extends the same provisions to the drawer and acceptor. This registration therefore is authorized by statute, and the publication complained of is merely the publication of a judicial record. It is impossible to contend that that which is publicly registered under the authority of a statute can be a libellous publication, and if not, it cannot become so by being repeated by a private individual, especially as the law of Scotland expressly makes all these registers "patent to all the lieges." The law itself intended them to be public.

But assuming the publication to be libellous, still a proceeding by way of interdict is not valid in law. This point may fairly be tried by reference to an injunction in this country. No injunction could be granted here to prevent the publication of a libel. An injunction is granted to prevent an interference with property. The well-known case in which an injunction was issued to prevent the

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(c) See note, *ante* p. 364.

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publication of certain private letters, was one in which that publication was sought to be prevented, on the ground that it was an interference with property. Such an injunction as that which is now asked is wholly without precedent. The granting of an injunction under such circumstances would be a usurpation of the authority of a jury and a court of law. Libel or no libel is a question of law, and the assumption of the authority to decide such a question by a court of equity would be the assumption of a new jurisdiction. Within these few days an application by Sir *James Clark* to prevent the continued publication of advertisements that certain pills were approved of and recommended by him, has been refused, on the ground that no question of property was involved, and the Court said that the application was, in substance, an application to prevent by injunction the publication of a libel, and must, therefore, be refused. The same reason applies here with greater force. The publication here is sought to be prevented, because the matter is alleged to be injurious to the reputation of the applicant. But that only shews that the publication may subject the publisher to an action for damages. That is the proper remedy and not a proceeding by way of interdict. Such a proceeding is prejudging the case, and prejudging it too in a manner contrary to law; for, admitting the publication to be injurious to character, no damages could be obtained in respect of it if it was true, for the defence of truth is an answer to a claim for damages. Now, it is clear, that equity would only interfere where the matter published was actionable. Equity, since truth is a defence to such an action, would, therefore, first enquire if the matter was true. But that implies an inquiry of fact—one which is not to be made upon affidavit, but by an issue. A court of equity could not exercise the functions of a jury, nor will it set up to be a court for the trial of questions of libel, nor to decide questions of fact, which can only be properly decided by an issue.

This argument supposes (and the supposition is made in favour of the respondent), that this publication could bear the character of a libellous publication. Even then the proceeding by interdict would be incompetent. But the publication cannot be treated as libellous. There was no personal motive hostile to the respondent in making it; no selection of a particular individual's name was made; no malice against him was proved; but there was a publication of all the names found in a certain Register, and that Register was itself a judicial document. The Register is a public document, created by the law, in which, by the terms of two acts of Parliament, these protests for non-acceptance or non-payment are to be entered; it is open for the inspection of every body; it is therefore essentially public, and the printing it in this list could not divest it of its public character, nor make it the subject of a private action.

In whatever way therefore this case is viewed, the want of authority to grant the interdict is manifest, and the judgment of the Court below must be reversed.

Mr. *Bethell* and Mr. *Anderson* for the respondent.—It is necessary, in the first place, to call attention to the stage of the proceedings where the question arose, and to consider first whether there is not on the face of the application itself sufficient to justify the Court in entertaining it? and next, whether, as the decree of the Court below is not a final decree, this appeal is not incompetent? The interlocutor is an *interim*, and not a final interlocutor. It merely suspends the case till the time of trial. *Bell's Dictionary* (a) fully explains this proceeding. After granting the interdict, the questions raised between the parties remain for further consideration. *Erskine*, in his *Institutes of the Law of Scotland* (b), shows that to be the case. It is there said, "Where there is no decree, there

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(a) Tit. Bill Chamber.

(b) Book 4, tit. 3, s. 20.

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may be suspension, though not in the strict acceptance of that word ; for suspension is a process authorised by law for putting a stop, not only to the execution of iniquitous decrees, but to all encroachments either on property or possession, and in general to every unlawful proceeding." The Court of Session acted on this principle in the case of *Miller v. Mitchell* (c), where the dismissed cashier of a bank printed a statement of the bank's accounts, which he said he intended only as instructions for his own counsel in a suit in which he was engaged against the bank, but copies of which got into other hands, and the numbers printed exceeded those which he could have required for the use of counsel. The Court there granted the interdict, and made him pay all the costs, on the ground that the publication was an unlawful proceeding. That case is precisely in point with the present. The Court, by granting the interdict, merely declares that there is enough to raise a serious ground for judicial consideration.

Under such circumstances can this House treat the proceeding as other than merely interlocutory ? If so the appeal is not competent. But suppose the appeal to be competent, then it is impossible for this House to say that there is no ground for further consideration. If not, then the judgment of the Court below cannot be reversed.

The facts of the case show that there was a good ground for making the application, so far as those facts were concerned, and no one judge in the Court below doubted the existence of the jurisdiction of the Court of Session. That jurisdiction is not now denied in direct terms, but it is contended that no injunction would be granted in such a case by the Court of Chancery in England, and therefore that it ought not to be granted by the

Court of Session. But that argument cannot be maintained; for all the Judges of the Court of Session speak of such a proceeding as one familiar to them. Lord *Fullerton* says, "This is a case in which the party is entitled to claim the protection of the Court. He is not bound to await the threatened injury by the publication, but has a manifest interest, and a legal right to take the competent measures to prevent it. It is one of the cases in which interdict is most appropriate and least objectionable. The one party may be materially injured by that which is threatened to be done, while the other can specify no possible injury which he can sustain from the prevention." These are the principles which govern the Courts in cases of applications for injunction, and where they occur the injunction is never refused. The Lord Justice *Clerk* says, "I am not of opinion that an intention to injure another, or as we call it in law, express or direct malice, or even constructive malice, is in any degree necessary in order to make the act complained of the proper subject for the cognizance and interference of a court of law, whether for the redress or for the prevention of the injury which may arise from that act."

[The *Lord Chancellor*.—Is not that asking the Court to exercise the powers of a censor?]

It may be that that argument of the Lord Justice *Clerk* carries the law to an extreme point, but the principle on which he proceeds is correct. The test of recovering damages is not a proper test by which to decide whether an interdict is maintainable. Suppose a man writes a letter, a jury might not give the writer one farthing damages, though a person wrongfully published that letter, but still the Court might grant an interdict to prevent the publication. The Lord Justice *Clerk* speaks positively as to that being the law of *Scotland*. He says, "An application for interdict against any act which may

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injure or prejudice, or seriously wound the feelings, or affect the interests of another, is not at all to be judged or disposed of by the consideration whether the act if done will give rise to a claim of damages." The case of the publication of a private letter is a case in point.

[The *Lord Chancellor*.—But there the right of property in the letter is involved.]

Still that is a case where damages could not be afterwards recovered. And then again the observation arises that that is a case taken from the law of *England*. Now it is clear that this appeal is not to be decided on the law of *England*, but on the law of *Scotland*; and not one of the Judges of the Court below felt the slightest doubt about the jurisdiction of the Court in such a matter. And the case of bankruptcy furnishes an analogy in favour of the respondent; for the publication of an advertisement will be restrained where it appears to the Court that the publication would be improper.

The only question remaining is the question whether that jurisdiction can, in this case, be properly exercised. In the first place this publication is attempted to be justified, because it is said that the Register is a public record. Secondly, it is said that the publication was without malice, and that it was made for a legitimate purpose.

As to the first of these points:—Is this a publication of a sentence or decree of a court of justice? It cannot be assimilated to a fair and impartial report of the proceedings of a court of justice, for here this is but an *ex parte* proceeding in a matter which has not terminated. Such a publication is never held to be protected. This is not like an argument *in foro contentioso*, where the statements on both sides are set forth. How can the public know the reasons (and there may be very good and sufficient reasons), why these notes were not paid when due? The thing published is the statement of one party only, which may convey a very erroneous impression as to

the fact. If a record of the Court of Chancery had been used in this way, that Court would interfere. The ground of that interference might be that such a dealing with a record of the Court was a contempt of Court. But the ground of interference is immaterial, if the Court would interfere. The publication of writs issued against a man, or of a declaration in an action, would not be justifiable, for both, though parts of a judicial proceeding, would be merely *ex parte* statements. The purpose of these Registers was to give a legal right to judgment in favor of certain parties who had proved a title thereto, not to make known to all the world what had been done with regard to a particular bill of exchange or promissory note. The Registers were only meant for the use of the parties directly concerned in the transaction.

The next point made by the appellants is, that the publication was without malice, and was for a legitimate purpose. But the motive of the act is immaterial, if the act is one which must of necessity be detrimental to another person. The person who makes the publication must, in law, be answerable for the consequences of it, and if those consequences are injurious, he must be supposed to have known that they would be so. The only exception to this rule is in the case of an act done in the execution of a legitimate authority. That was not the case here. The fact that the parties claimed to be interested in the matter did not give them authority to make the publication. The case of *Goldstein v. Foss* (a), as reported in *Barnewall* and *Cresswell's* Reports, is not in point to justify the publication, for that case was decided on the form of the pleadings alone, and left the right of publication untouched. But there is another report (b) of that case when it occurred at *Nisi Prius*, which shews that a publication of this sort was held to be libellous.

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(a) 6 Barn. & Cr. 154 ; 4 Bing. 489.

(b) 2 Carr. & Payne, 252.



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The facts were these :—A Society had been formed, called “The Society for the Protection of Bankers and others.” By its rules all fair traders were admissible. The secretary sent round a circular to the members, in which he said that he was directed to inform them that the plaintiff (and two other persons whom he named), were not deemed eligible to be members of that Society. It was proved that that form of writing was understood to mean that he pointed out the plaintiff as a swindler. Lord *Tenterden* told the jury that there could be no doubt that such a publication was libellous, and the plaintiff obtained a verdict for 150*l.* damages. That case is an authority to shew that this publication is not one which is justified by law, but is one that may be the subject of a claim for damages. If so, the publication cannot be justified as one made under the authority of the law.

Then it is said that this publication might be shewn to be true, and that the proof of truth would be a complete defence for publishing it. But that argument, even if correctly stated, can only apply to *English* cases, for in *Scotland* the truth of a defamatory publication is not an answer to the right of action by the party injured.

Mr. *Wortley* replied.—The Registers are meant for the information of every body else ; no directions would be given to make indexes to them for the purpose of facilitating searches. Such a labour would be quite unnecessary, if they were merely intended as records of judgments for the benefit of the parties making them. Then as to a decree of interdict and suspension being merely an interlocutory and not a final proceeding, the case of *Fleming v. Dunlop* (a) establishes that it is a final decree, and as such may be made the subject of appeal to this House. The case of *Goldstein v. Foss*, as reported in *Carrington* and

(a) 7 Clark & F. 43.; Mc Lean & R. 547.

*Payne* (b), shews that the jury considered the publication there to be libellous ; but that case either does not affect the present, or is an authority in favour of the argument for the appellants ; for the question of libel or no libel is one which is peculiarly for the decision of a jury, and which cannot be decided by a court of equity. Nor can a court of equity anticipate the verdict of a jury on such an issue. The law of *Scotland* does not differ from the law of *England* on the subject of the truth being an answer to an action of libel ; *Bell's Principles* (c). The case of *Miller v. Mitchell* (d), does not establish that an interdict would lie in a case like the present. There the thing published was not a public document, but a private statement, and the subsequent report of the same case, under the name of *Smith v. Mitchell* (e), shews that the proceeding was one for contempt of Court, and that the question of the right to issue an interdict was never discussed. The same case, reported in another book (f), is reported under the title "Contempt of Court."

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Mr. *Bethell*, in reply on the case of *Fleming v. Dunlop*, now first cited :—That case furnishes no analogy to the present. The remedy there sought by the interdict was final in its nature. It was the decision of a right to a seat in a corporation, the proceeding being the same as our *quo warranto*. Here the Court is not asked to decide anything, but merely to stop something till a certain matter has been decided upon. That is clearly an interlocutory proceeding.

The *Lord Chancellor*.—If it was necessary to lay down a rule respecting the jurisdiction which has been exer-

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(b) Vol. 2, p. 252.

(c) 14 Dunl. B. & M. 172.

(e) Page 759, s. 2057.

(f) 8 Scottish Jurist, 105.

(d) 13 Shaw & D. 644.

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cised in this cause by the Court of Session in granting interdict against the publication of libels, this cause would be one of the highest importance, and, in the present state of information submitted to this House, of the greatest difficulty ; for it is impossible to read the observations of the learned Judges in the Court below without seeing that there is much want of precision in their observations upon the subject. But being, as I am, of opinion that the general question is not necessarily involved in the consideration of this appeal, I think it expedient, under the circumstances, to avoid giving any opinion upon that general question. I cannot, however, avoid expressing an earnest hope that, if this question should arise and require a decision in the Court of Session, and no distinct rule should be found already to exist upon the subject, the consequences of any rule to be established for the first time will be most carefully considered before such a rule is laid down ; and particularly that it may be considered how the exercise of such a jurisdiction can be reconciled with the trial of matters of libel and defamation by juries under the 55 George III., cap. 42, or indeed with the liberty of the press. That act appoints a jury as the proper tribunal for trial of injuries to the person by libel or defamation ; and the liberty of the press consists in the unrestricted right of publishing, subject to the responsibilities attached to the publication of libels, public or private. But if the publication is to be anticipated and prevented by the intervention of the Court of Session, the jurisdiction over libels is taken from the jury, and the right of unrestricted publication is destroyed. And I must add, that, according to the doctrine attributed to the Lord Justice *Clerk*, in the printed report of his judgment, the exercise of this power would be quite arbitrary ; for he considers that the right to claim damages, if the act had been committed, is not the test according to which the interdict must be granted or refused.

I do not pursue this question further because, assuming the jurisdiction of the Court in matters of interdict to be as extensive as it is claimed, I think that in this particular case it has been improperly exercised.

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Bills and notes dishonoured and protested are by certain acts of Parliament to be registered. From this register the appellants are in the practice of publishing lists, copy, or excerpts, and the object of the interdict is to restrain the appellants from printing in such lists the name of the respondent: that is, he, admitting the fact that the two notes in question have been dishonoured by him, prays that that fact may not be published. He himself, by the application for the interdict, not only admits the fact, but gives to that fact a greater degree of publicity than would have attended it if his name had been inserted in the list.

If the publication intended had been a narrative or statement injurious to the party complaining, and which he had a right to prevent, the observation might not apply; but in this particular case, the jurisdiction by interdict being to prevent a wrong, we find it exercised in a case in which it could not possibly have any such effect. I found my opinion upon this, that the publication of the fact proposed to be inserted in the appellants' lists, has been made by the act of Parliament in certain Registers, the contents of which are public property, and the publication of them authorised.

The act of 1681, chapter 20, enacts that foreign bills, shall be registrable in the books of Council and Session "to the effect that it may have the authority of the judges for the process to issue in like and in the same manner as upon registered bonds and decreet of registration proceeding upon consent of parties." Subsequent acts extended these provisions to inland bills and promissory notes. The result of them all is to give this registration the effect of a decree or judgment of the Court of Session. It is

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equivalent to what, in this country, we call a judgment upon a warrant of attorney. In neither case does the Court interfere, but in both, as in cases of judgment by default and decret in absence, the party having a right to the authority of the Court to confirm his claim, obtains the judgment as of course. Whether that judgment is obtained by authority of Parliament, or by the consent of parties, or by the practice of the Court, appears to me to be immaterial. It is for all purposes a judgment of the Court until altered or reversed, and entitled to all the attributes of any judgment after the longest and most contested litigations.

This indeed is not in dispute. The Lord Justice *Clerk* says in his judgment, "I hold the Register to be a proper record of Court, as much as the actual book of procedure now on the table, and entered up from day to day by the clerks. The party appears with his protest, and asks the Court for a certain decree upon it; which decree is not obtained by deliverance which leaves the Court, but by an entry in the book of Court."

Is it then unlawful to state or publish the decret or judgment of Courts of justice? If their proceedings are public, so must be the result of such proceedings, namely, the judgment. For although the steps preliminary to the judgment are not transacted in open Court (the whole being incontestible in that stage), yet the whole is supposed to be the result of regular proceedings in court. The Register, therefore, is in its nature public; but it is especially made so for purposes distinct from the object of giving effect to the right of the party. So Lord *Bankton* states in the passage referred to, 4, 4, 18. The Act of Registration of 1696 provides that the Register under the clerk register's keeping, "shall be patent to all the lieges." This includes the books of council and session in which the entry of protests is kept. The 55th Geo. III., c. 70, regulates the keeping of registers of deeds and instruments

of protest ; section 27 of the 1 & 2 Geo. IV., c. 38, provides for making indexes to certain and divers registers, and amongst others, to adjudications recorded in the books of council and session for the purpose of easy reference, and that they may be made accessible to the public. It appears that in fact no index was made of the Register of Protests, but by the table of fees a different fee is payable for searches where there is and where there is not an index ; so that the contents of all the registers, whether with indexes or not, are open to the public upon payment of a certain fee.

So far are any proceedings of the Court from being considered shut against the public, that by the 1 & 2 Vict., c. 118, s. 22, it is provided that the minute book of the Court of Session Teind Court, the record of edictal citations, the weekly calling list of causes, and the weekly printed roll of outer house and teind causes, shall be printed by the respective keepers thereof, and shall be sold to the public at the lowest rate, which will repay the necessary expense of printing the same.

From these references it appears to me clear that the legislature has thought that the public at large ought to be able to have recourse to this Register, and of all the public the appellants have the highest interests in the knowledge of its contents. They are engaged in mercantile affairs, in which their security and success must greatly depend upon a knowledge of the pecuniary transactions and credit of others. That each of them might go or send to the office and search the Register is not disputed, and that they might communicate to each other what they had found there is equally certain. What they have done is only doing this by a common agent, and giving the information by means of printing. No doubt, if the matter be a libel, this is a publication of it, but the transaction disproves any malice, and shews a legitimate object for the act done.

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I think, therefore, that upon this view of the case also the respondent has failed to establish any title to the interdict, which, though *ad interim* only, must be discharged unless shown to rest upon some tenable ground. Now, it must be admitted that no case can be produced in which such an interdict as the present has been supported. The proceeding is in its nature, much in the discretion of the Court, and most so when the case is perfectly new. In the exercise of that discretion I think the Court of Session ought to have refused the interdict; and, therefore, I advise your Lordships to reverse this interlocutor.

Sir *Fitzroy Kelly*.—I am humbly to ask for judgment that the interdict be recalled, with costs below.

Mr. *Anderson*.—The costs of the consultation of judges ought not to be included. Lord *Cunningham* referred the bill and answer to the whole of the judges, considering it a difficult question, and all the judges with us upon the competency, and eight out of twelve are so upon the merits.

The *Lord Chancellor*.—Unless there has been some course of practice in the Court of Session to the contrary, no doubt the party who succeeds here is entitled to his costs below.

Mr. *Anderson*.—It is quite discretionary.

The *Lord Chancellor*.—Then I am quite sure that the interlocutor ought to be dismissed with costs below.

Interlocutor reversed; the cause to be remitted with directions, to the court below to recall the interdict, and to refuse the note of suspension and interdict; and the costs in the Court below directed to be paid to the appellants.

|                            |   |   |                     |                                  |
|----------------------------|---|---|---------------------|----------------------------------|
| DUNLOP and Others          | - | - | <i>Appellants.</i>  | 1848.<br>February<br>21, 22, 24. |
| VINCENT HIGGINS and Others | - | - | <i>Respondents.</i> |                                  |

A letter offering a contract does not bind the party to whom it is addressed to return an answer by the very next post after its delivery, or to lose the benefit of the contract ; an answer, posted on the day of receiving the offer, is sufficient.

*Contract—  
Acceptance of,  
Post Letter.  
Damages.*

A contract is accepted by the posting of a letter declaring its acceptance.

A person putting into the post a letter declaring his acceptance of a contract offered, has done all that is necessary for him to do, and is not answerable for casualties occurring at the Post Office.

In an action for damages for breach of contract in the sale of goods, the measure of damages is not merely the amount of the difference between the contract price, and the price at which such goods could be bought at the moment when the contract was broken ; but likewise a compensation for such profit as might have been made by the purchaser had the contract been duly performed.



THIS was an appeal against a decree of the Court of Session, made under the following circumstances :—Messrs. *Dunlop* and Co. were iron masters in *Glasgow*, and Messrs. *Higgins* & Co., were iron merchants in *Liverpool*. Messrs. *Higgins* had written to Messrs. *Dunlop* respecting the price of iron, and received the following answer :—“ *Glasgow*, 22nd *January*, 1845. We shall be glad to supply you with 2,000 tons, pigs, at 65 shillings per ton, net, delivered here.” Messrs. *Higgins* wrote the following reply :—“ *Liverpool*, 25th *January*, 1845. You



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say 65*s.* net, for 2,000 tons pigs. Does this mean for our usual four months bill? Please give us this information in course of post, as we have to decide with other parties on *Wednesday* next." On the 28th Messrs. *Dunlop* wrote,—“ Our quotation meant 65*s.* net, and not a four months bill.” This letter was received by Messrs. *Higgins* on the 30th of *January*, and on the same day, and by post, but not by the first post of that day, they dispatched an answer in these terms :—“ We will take the 2,000 tons pigs, you offer us. Your letter crossed ours of yesterday, but we shall be glad to have your answer respecting the additional 1,000 tons. In your first letter you omitted to state any terms ; hence the delay.” This letter was dated “ 31st *January*.” It was not delivered in *Glasgow* until two o'clock, p.m., on the 1st of *February*, and, on the same day, Messrs. *Dunlop* sent the following reply :—“ *Glasgow*, 1st *February*, 1845. We have your letter of *yesterday*, but are sorry that we cannot now enter the 2,000 tons pig iron, our offer of the 28th not having been accepted in course.” Messrs. *Higgins* wrote on the 2d *February* to say that they had erroneously dated their letter on the 31st *January*, that it was really written and posted on the 30th, in proof of which they referred to the post mark. They did not, however, explain the delay which had taken place in its delivery. The iron was not furnished to them, and iron having risen very rapidly in the market, the question whether there had been a complete contract between these parties was brought before a court of law. Messrs. *Higgins* instituted a suit in the Court of Session for damages, as for breach of contract. The defence of Messrs. *Dunlop* was, that their letter of the 28th, offering the contract, not having been answered in due time, there had been no such acceptance as would convert that offer into a lawful and binding contract ; that their letter having been delivered at *Liverpool* before eight o'clock in the morning of the 30th of *January*, Messrs.

*Higgins* ought, according to the usual practice of merchants, to have answered it by the first post, which left *Liverpool* at three o'clock p.m. on that day. A letter so dispatched would be due in *Glasgow* at two o'clock, p.m., on the 31st of *January*; another post left *Liverpool* for *Glasgow* every day at one o'clock, a.m., and letters to be dispatched by that post must be put into the office during the preceding evening, and if any letter had been sent by that post on the morning of the 31st, it must have been delivered in *Glasgow* in the regular course of post at eight o'clock in the morning of the 1st of *February*. As no communication from Messrs. *Higgins* arrived by either of these posts, Messrs. *Dunlop* contended that they were entitled to treat their offer as not accepted, and that they were not bound to wait until the third post delivered in *Glasgow* at two o'clock p.m., of *Saturday* the 1st of *February* (at which time Messrs. *Higgins*' letter did actually arrive), before they entered into other contracts, the taking of which would disable them from performing the contract they had offered to Messrs. *Higgins*.

The cause came before Lord *Ivory*, as Lord Ordinary, who directed an issue, which he settled in the following terms :—

“Whether, about the end of *January*, 1845, Messrs. *Higgins* purchased from Messrs. *Dunlop* 2,000 tons of pig iron, at the price of 65s. per ton, and whether Messrs. *Dunlop* wrongfully failed to deliver the same, to the damage, loss, and injury of the pursuers? Damages laid at 6,000*l*.” This issue was tried before the Lord Justice General, when it appeared that the letter of Messrs. *Higgins*, accepting the offer, was written on the 30th; that it was posted a short time after the closing of the bags for the dispatch at three o'clock, p.m., on that day, and consequently did not leave *Liverpool* till the dispatch at one o'clock in the morning of the 31st; that in consequence of

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the slippery state of the roads, the bag then sent did not arrive at *Warrington* till after the departure of the down train that ought to have conveyed it, and that this circumstance occasioned it to be delayed beyond the ordinary hour of delivery. The Lord Justice General told the jury, "that he adopted the law as duly expounded in the case of *Adams v. Lindsell* (a), and which is as follows:— 'A., by a letter, offers to sell to B. certain specified goods, receiving an answer by return of post; the letter being misdirected, the answer notifying the acceptance of the offer arrived two days later than it ought to have done; on the day following that when it would have arrived, if the original letter had been properly directed, A. sold the goods to a third person,' and in which it was held "that there was a contract binding the parties from the moment the offer was accepted, and that B. was entitled to recover against A. in an action for not completing his contract."

The counsel for Messrs. *Dunlop* tendered the following exceptions:—The first exception related to evidence, and alleged "that no evidence to shew that the letter, purporting to be dated on the 31st, was really written on the 30th of *January*, ought to have been admitted." The other exceptions related to the charge, and were as follow:

2. In so far as his Lordship directed the jury, in point of law, that if Messrs. *Higgins* posted their acceptance of the offer in due time, according to the usage of trade, they are not responsible for any casualties in the Post Office establishment.

3. In so far as his Lordship did not direct the jury, in point of law, that if a merchant makes an offer to a party at a distance, by post-letter, requiring to be answered within a certain time, and no answer arrives within such time as it should arrive, if the party had written and

(a) 1 Barn. & Ald. 681.

posted his letter within the time allowed, the offerer is free, though the answer may have been actually written and posted in due time, if he is not proved to be aware of accidental circumstances preventing the due arrival of the answer.

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4. In so far as his Lordship did not direct the jury, in point of law, that in the case above supposed, if an answer arrives, bearing a date beyond the time limited as above for making answer, and arrives by a mail, and is delivered at a time corresponding to such date, the offerer is entitled to consider himself free to deal with the goods as his own, either to sell or to hold, if he be not in the knowledge that the answer received was truly written of an earlier date, and delayed in its arrival by accident.

5. In so far as his Lordship did not direct the jury, in point of law, that in case of failure to deliver goods sold at a stipulated price, and immediately deliverable, the true measure of damage is the difference between the stipulated price and the market price, on or about the day the contract is broken, or at or about the time when the purchaser might have supplied himself.

These exceptions were afterwards argued before the judges of the First Division, who pronounced an interlocutor, disallowing the exceptions ; and that interlocutor was the subject of the present appeal.

Mr. *Bethell* and Mr. *Anderson* for the plaintiffs in error.

The question raised in this case is one of considerable importance, and the decision of it in accordance with the judgment of the Court below, will have the effect of rendering the acceptance of contracts a matter of doubt and uncertainty. If the decision of the Judges of the Court of Session is right, a contract is complete when the acceptance of the offer to enter into it is posted, although such acceptance may not reach the person who made the offer till long after the time at which, by the usage of trade, he is entitled to expect it. Such a decision, if

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unreversed, will leave the person making an offer under the necessity of waiting for an indefinite time in order to know whether his offer has been accepted. During all this time he will be restrained from freely dealing with his own property.

The exceptions here ought to have been sustained by the Court. The first of them relates to the evidence offered at the trial. That evidence was improperly admitted. The Court ought not to have received evidence to contradict a written document. When a letter is sent to a party, he has a right to assume that it is properly written, and is entitled to rely on its contents. He is at least entitled to do so as against the writer of the letter. The writer is not at liberty to shew those contents to be erroneous: at all events he is not at liberty to do so after the person receiving it has acted upon it, and thus to affect the rights of that party, and to give himself rights to which, if the letter had been correctly written, he would not have been entitled. To admit such evidence is to unsettle all the rules of business, and to prevent commercial men acting with that certainty and confidence which are necessary for the proper conduct of commercial affairs.

[The *Lord Chancellor*.—When a party sends a letter, actually sent on the 30th, but dated by mistake on the 31st, may he not shew that that date has been put in by mistake?]

It might be difficult to maintain the simple negative of that question, but in considering the admissibility of such evidence, all the circumstances of the case must be referred to. In the present case, for instance, as the letter was received on a day after that of its date, and when, therefore, the person receiving it had no reason to suspect that the date was erroneously given, his rights ought not to be affected by a subsequent explanation; and the evidence intended to afford that explanation ought not therefore to have been admitted.

Then as to the second exception: if a letter sent is posted in due time, but is not received in due time, who is to bear the loss consequent upon its non-delivery? Certainly not the person to whom it is sent. The fact that it is sent by the Post Office makes no difference in the matter (*b*). It is the same as if the letter was sent by a special messenger, in which case it is plain that the person sending the messenger would be responsible for any accident or delay. The appellants are not to be made responsible for the casualties of the Post Office, and surely they cannot be made so in a case in which the persons sending an answer to an offer which they had made, totally disregarded the ordinary usages of commercial houses as to the time of sending such answer.

The clear principle, set forth in the third objection, is that which ought to be adopted in all cases of this kind. Where an individual makes an offer by post, stipulating for, or, by the nature of the business, having the right to expect, an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it. When a person seeks to acquire a right, he is bound to act with a degree of strictness, such as may not be required where he is only endeavouring to excuse himself from a liability. The question of reasonableness of notice, which may be admitted in cases of bills of exchange, cannot be introduced in a case where one party seeks to enforce on

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(*b*) But see *Kufh v. Weston*, 3 Esp. 54. There a letter, containing a bill of exchange, drawn on a house at *Genoa*, was put into the *London* Post Office on the first *Italian* post day, but, from the disturbed state of *Italy*, did not arrive at *Genoa* till a month after the bill became due. Lord *Kenyon* held that sufficient notice had been given, for that the parties could not foresee that the post would be interrupted.

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another the acceptance of a contract. A bill of exchange is already a binding contract; no new right is acquired by notice; it is merely a necessary proceeding to enable the party giving it to enforce a right previously created.

Then as to the exception. In the case of a contract, the acceptance of the offer creates the contract; the acceptance implies that both parties have knowledge of all the circumstances. On principle, it is plain that the acceptance should be immediate, and that if there is a delay in making that acceptance known, the offerer is free. In order to make the contract perfect, there ought to have been a co-existing assent. *Countess of Dunmore v. Alexander (b)*. There, a lady having written to another to engage a servant for her, and then sent a second letter to countermand the first, and the two letters having been delivered to the servant simultaneously, it was held that there was not a complete contract, and that the servant was not entitled to wages. The Court of King's Bench, in *Head v. Diggon (c)*, acted upon the same principle. There, A. and B. being together, B. offered goods to A. at a certain price, and gave A. three days to make up his mind. The Court held that this was not an absolute bargain, and that within the three days B. had a right to retract.

Such are the principles which ought to govern this case. Then as to authority. It is curious enough that this exact question seems never to have arisen. That circumstance is some proof of the clearness of the principle which is applicable to such transactions, for had there been any question as to that principle—had it been doubtful whether delay might be excused, and whether, in spite of delay, a party guilty of it might not still insist on a contract being complete, cases must have arisen as to the degree of laxity permitted by the law in the acceptance of contracts. None such is to be found. The case of *Adams v.*

(b) 9 Shaw and Dunl. 190. (c) 3 Man. and Ryl. 97.

*Lindsell* (d), was the authority adopted by the Lord Justice General in his direction to the jury: but that case does not justify his ruling. [The *Lord Chancellor*.—If the letter of acceptance is sent in the usual way, is the sender still responsible for its due delivery?] If not, then both parties are free. One cannot be bound while the other is free. Each party takes an equal risk. But supposing delay is to be permitted, to what extent is it to be allowed? May the delay last one, two, or three days, or a week, or a fortnight, or a month? If any delay is to be permitted, the extent of it must be defined. Otherwise, all commercial matters will be in a state of perpetual uncertainty. But, in fact, no delay is allowed. Each party is bound to write by return of post, and each is liable to the consequences of his own letter arriving in time. Such appears to be the mercantile usage on the subject. When an offer is made by one merchant to send to another a particular commodity which varies in price, that offer is made subject to the obligation of its being answered by return of post. It is therefore an offer subject to a condition. It is conditional, in point both of time and manner of acceptance. As to time, the offer enures till it can be answered by return of post. If it is made on a condition, then it is clearly not binding till that condition shall be accepted. Here, too, the condition is a condition precedent. Nothing, therefore, can be substituted for it.

<sup>u</sup> [The *Lord Chancellor*.—Where is this condition imposed?]

In mercantile usage, founded on law. The legal condition is to return an answer in a particular time. Mercantile usage has fixed that time as the return of post. No decision has ruled, as a point of legal principle, that, if an individual addressed fails in performing this condition, still that the person making the offer is bound. The

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principle of the *Scotch* law, as stated in *M'Douall's* Institutes, is the other way. It is there said (*b*), "conditional obligations, properly so termed, are presently binding and irrevocable, and only the effect is suspended, but sometimes the obligation is only to be contracted upon a condition which affects the very substance of it. Thus an offer has an implied condition of acceptance, whereby alone the consent of the other party accedes and converts the offer into a contract; so that it is not binding, but ambulatory or revocable, till it is accepted, and therefore either revocation by the offerer, or death of either party before acceptance, voids it. The same rule holds in mutual contracts—the one party subscribing is not bound till the other subscribe likewise." The law of England is in conformity with the principle of the *Scotch* law.

As the revocation by either party before acceptance makes the offer void, the acceptance of the other side must be notified within a definite period of time; *Stair's* Institutes (*c*). This rule of notification is a condition precedent in the *English* as well as the *Scotch* law. This principle was acted on by the Court of King's Bench in the case of *Davison v. Mure* (*d*). That was the case of a ship which was captured by the *Americans* while under convoy. The condition there was that the master should make the best defence, and without it appeared to a court-martial that he had done so, he was not to be allowed to recover. It was held that this condition was a condition precedent. The same doctrine was applied by that Court to the condition in a policy of insurance against fire, that the party should obtain a certificate from the rector of his parish, and a certain number of the inhabitants, before entitling himself to payment of his claim for loss; *Worsley v. Wood* (*e*). If this is a condition precedent, then it

(*b*) Bk. 1, tit. 4, p. 98, fol. ed. (*d*) 3 Doug. 28.

(*c*) Tit. 2, s. 8.

(*e*) 6 Term Rep. 710.

must be exactly performed, and nothing can be substituted for it. In this respect there is a difference between a condition precedent and a condition subsequent. The former must be performed before an estate can vest; while the performance of the latter, which is intended to defeat an existing estate, may be dispensed with. The act of God, the king's enemies, or the impossibility of performance, will furnish an excuse as to a condition subsequent. This is a settled principle of our law, and the case of *Brodie v. Todd* (f) shows that the law of *Scotland* recognises the same rule. In that case, *Arnot*, a merchant of *Leith*, agreed to purchase from *Todd & Co.* of *Hull*, goods which were to be paid for by his acceptance. They put the goods on board a vessel at *Hull*; enclosed a bill of lading and a draft for the price, in a letter, advising *Arnot* of the shipment, and requesting him to return the draft accepted "in course." This letter was received by *Arnot* on the morning of the 24th of *April*, and if answered by him by return of post, the answer might have been received by *Todd & Co.* on the morning of the 26th. *Arnot*, however, did not answer it till that day, when he sent back the draft accepted. In the course of the 26th, *Todd & Co.* not having received the draft as expected, re-landed the goods. *Arnot* brought an action; and the question was, whether the request to return "in course," meant a return by the earliest post, and constituted a condition precedent. The Lords held that the words meant by return of post, and did constitute a condition precedent, and consequently that no action was maintainable by *Arnot*, since he had not complied with the condition on which the bargain was made. That case is completely decisive as to what is the doctrine of the *Scotch* Law, and must govern the decision here.

(The *Lord Chancellor*.—Is it not a question of fact,

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(f) 17 Fac. Col. Dec. 20, May 1814.

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whether the posting of the letter, in this case, on the 30th of *January*, was not a compliance with the duty of the party? Here is no distinct stipulation—it is all matter of inference. The question is, whether putting in the post is not a virtual acceptance, though by the accident of the post it does not arrive. In the case quoted, one whole day was allowed to intervene. But in this case, if putting the letter in the post is a compliance with the condition, there is an end of the question).

That would be so, if it was a condition subsequent, for then something could be substituted for actual performance. But this is a condition precedent, and must be literally performed.

In considering this question, Lord *Jeffrey* observed,—“ The party here only says, ‘ If I do not hear by return of post.’ I have yet to learn that the return of post is like the return of the sun to the meridian at a particular time. I do not think that the use of such a phrase is equivalent to the stipulation of a particular time. I am inclined to hold that the return of post means the actual return of the post. And the *species facti* here was, the letter accepting the offer having been sent in due time to the Post Office, that it did come to hand at the hour at which, according to the usual time required for its transmission, it should have come. But the actual course of *that* post was not till the morning of the 1st *February*.” And the learned judge justifies his doctrine by referring to the case of the post coming by sea, where a general average time is fixed, but where return of post is not calculated by that average, but by the actual arrival of the post; and then he supposes a universal snow storm affecting the delivery by land, and argues that if matter of that general notoriety would affect the question, so does any other accident to the post although not so generally known. But surely this is giving an entirely new interpretation to mercantile contracts, and is making accidental circumstances or natural

delays, always counted upon, furnish ground for the construction of a delay occasioned by an accident which neither party anticipated. Besides, it is clear on the facts here, that had the letter been put into the early post of the 30th *January*, this accident would not have befallen it ; so that the accidental delay in the Post Office was really the consequence of the delay in posting the letter, and was so far attributable to the respondents.

They cannot, therefore, claim any advantage, from their acceptance of the contract, which acceptance they did not notify, nor condemn the other parties for non-performance of a contract, the acceptance of which they did not know. It is the acceptance which completes the contract. The agreement is not suspended till the offerer has actually received notice of the acceptance, but only until he might have received notice, had that notice been forwarded at the earliest moment. This is the rule declared in *Bell's Principles of the Law of Scotland (a)*, and this rule must be applied to, and must govern the decision of the present case.

Then as to the question of damages : There was no proof that there had been one shilling of special damage arising from the non-performance of the contract by the appellants ; the damages must therefore be calculated in the ordinary way. The fifth exception shows that there was a complete breach of the agreement on the 2nd of *February*, and the damages should have been calculated on the price of pig iron at that time.

(The *Lord Chancellor*.—But was not that simply a question for the jury, and not ground for a bill of exceptions ?)

It was not. It was a question on which the jury should have received a direction as to the law ; *Watt v. Mitchell (b)*. The cases of *Gainsford v. Carroll (c)*, and *Shaw*

(a) Page 35, s. 78.

(c) 2 Barn. & Cres. 624.

(b) 1 Dunl., Bell, & M. 1157.

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v. *Holland* (c), clearly show what is the law on this subject, namely, that in an action for the non-delivery of goods on a given day, pursuant to contract, the proper measure of damages is the difference between the contract price and the market price on the day when the contract was broken, allowing the purchaser however a reasonable time to purchase the article for which he had contracted.

Mr. *Stuart Wortley* and Mr. *Hugh Hill* for the respondents, were not called on.

The *Lord Chancellor*.—My Lords, everything which learning or ingenuity can suggest on the part of the appellants, has undoubtedly been suggested on the part of the learned counsel who have just addressed the House ; and if your Lordships concur in my view, that they have failed in making out their case, you will have the satisfaction of knowing that you have come to that conclusion after having had everything suggested to you that by possibility could be advanced in favour of this appeal.

The case certainly appears to me one which requires great ingenuity on the part of the appellants, because I do not think that, in the facts of the case, there is anything to warrant the appeal. The contest arises from an order sent from *Liverpool* to *Glasgow*, or rather a proposition sent from *Glasgow* to *Liverpool*, and accepted by the house at *Liverpool*: It is unnecessary to go earlier into the history of the case than the letter sent from *Liverpool* by *Higgins*, bearing date the 31st of *January*. A proposition had been made by the *Glasgow* house of *Dunlop, Wilson, and Co.*, to sell 2000 tons of pig iron. The answer is of that date of the 31st of *January*:—"Gentlemen, we will take the 2000 tons, pigs, you offer us." Another part of the letter refers to other arrangements ; but there is a dis-

tinct and positive offer to take the 2000 tons of pigs. To that letter there is annexed a postscript in which they say, "We have accepted your offer unconditionally; but we hope you will accede to our request as to delivery and mode of payment by two months' bill."

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That, my Lords, therefore, is an unconditional acceptance, by the letter dated the 31st of *January*, which was proved to have been put into the post office at *Liverpool* on the 30th; but it was not delivered, owing to the state of severe frost at that time, which delayed the mail from reaching *Glasgow* at the time at which, in the ordinary course, it would have arrived there. The letter having been put in on the 30th of *January*, it ought to have arrived at *Glasgow* on the following day, but it did not arrive till the 1st of *February*.

It appears that between the time of writing the offer and the 1st of *February*, the parties making the offer had changed their minds; and instead of being willing to sell 2000 tons of pig iron on the terms proposed, they were anxious to be relieved from that stipulation, and on that day, the 1st of *February*, they say, "We have yours of yesterday, but are sorry that we cannot enter the 2000 tons of pig iron, our offer of the 28th not having been accepted in course."

Under these circumstances, the parties wishing to buy, and by their letter accepting the offer, instituted proceedings in the Court of Session for damages sustained by the non-performance of the contract. And the first question raised by the first exception applies not to the summing up of the learned Judge, but to the admission of evidence by him; for connected with that admission of evidence is the first exception. I need hardly say but little on this point, but as it formed part of the proceedings on which the judgment must ultimately be pronounced, I will very shortly call your Lordships' attention to the proposition presented for your decision by that first exception.

My Lords, the exception states, "that the pursuers

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having admitted that they were bound to answer the defenders' offer of the 28th, by letter written and posted on the 30th, and the only answer received by the defenders, being admitted to be dated on the 31st of *January*, and received in *Glasgow* by the mail, which in due course ought to bring the *Liverpool* letters of the 31st, but not *Liverpool* letters of the 30th, it is not competent in a question as to the right of the defenders to withdraw or fall from the offer, to prove that the letter bearing date the 31st of *January*, was written and dispatched from *Liverpool* on the 30th, and prevented by accident from reaching *Glasgow* in due course, especially as it is not alleged that the defenders were aware (previous to the 3rd of *February*) of any such accident having occurred."

The counsel for the pursuer answered, that nothing had been stated, but that the pursuers were bound instantly to answer the defenders' offer of the 28th of *January*, and that according to the practice of merchants, it was sufficient if that letter was answered on that day on which it was received.

The Lord Justice General did overrule the objection, and admitted the evidence.

The exception is that the learned Judge was wrong in permitting the pursuer to explain his mistake. The proposition is, that if a man is bound to answer a letter on a particular day, and by mistake puts a date in advance, he is to be bound by his error, whether it produces mischief to the other party or not. It is unnecessary to do more than state this proposition in order to induce you to assent to the view I take of the objection, and to come to the conclusion that the learned Judge was right in allowing the pursuer to go into evidence to show the mistake.

I pass on then to the fourth exception which is connected with this point, and which states that his Lordship did not direct the jury in point of law; that in the case above supposed, if an answer arrives, bearing a date beyond the time limited as above for making answer, and

arrives by a mail, and is delivered at a time corresponding to such date, the offerer is entitled to consider himself free to deal with the goods as his own, either to sell or to hold, if he was not in the knowledge that the answer received was duly written at an earlier date, and delayed in its arrival by accident; that is to say, that if a letter bears a date which, on the face of it, shows that it was written erroneously, nevertheless the party is bound by the date so written on the face of the letter, and you cannot go into the circumstances to explain how it happened that the letter did not arrive in time, but that you are bound to assume that it arrived on the day mentioned, and the party cannot give any evidence in explanation.

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My Lords, that falls with the other exception, and the two together go for nothing. I merely state it for the purpose of asking your Lordships to concur in the opinion that I have formed—that the learned Judge was correct in the mode in which he left the question to the jury, and consequently that on that point the bill of exceptions cannot be supported.

The next exception to be considered is the second, and that raises a more important question, though not one attended with much difficulty. The exception is, that his Lordship did direct the jury in point of law, that if the pursuers posted their acceptance of the offer in due time, according to the usage of trade, they are not responsible for any casualties in the Post Office establishment.

Now, there may be some little ambiguity in the construction of that proposition. It proceeds on the assumption that, by the usage of trade, an answer ought to have been returned by the post, and that the 30th was the right day on which that answer ought to have been notified. Then comes the question, whether, under those circumstances, that being the usage of trade, the fact of the letter being delayed, not by the act of the party sending it, but by an accident connected with the post, the party so



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putting the letter in on the right day is to lose the benefit which would have belonged to him if the letter had arrived in due course ?

I cannot conceive, if that is the right construction of the direction of the learned Judge, how any doubt can exist on the point. If a party does all that he can do, that is all that is called for. If there is a usage of trade to accept such an offer, and to return an answer to such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done every thing he was bound to do ? How can he be responsible for that over which he has no control ? It is not the same as if the date of the party's acceptance of the offer had been the subject of a special contract : as if the contract had been, "I make you this offer, but you must return me an answer on the 30th, and on the earliest post of that day." The usage of trade would require an answer on the day on which the offer was received, and Messrs. *Higgins*, therefore, did on the 30th, in proper time, return an answer by the right conveyance—the Post Office.

If that was not correct, and if you were to have reference now to any usage constituting the contract between the parties a specific contract, it is quite clear to me that the rule of law would necessarily be that which has obtained by the usage of trade. It has been so decided in cases in *England*, and none has been cited from *Scotland* which controverts that proposition ; but the cases in *England* put it beyond all doubt. It is not disputed—it is a very frequent occurrence, that a party having a bill of exchange, which he tenders for payment to the acceptor, and payment is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him ; if he puts a letter into the post at the right time, it has been held quite sufficient ; he has done all that he is expected to do as far as he is concerned ; he

has put the letter into the post, and whether that letter be delivered, or not, is a matter quite immaterial, because, for accidents happening at the Post Office he is not responsible.

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My Lords, the case of *Stocken v. Collen (a)*, is precisely a case of that nature, where the letter did not arrive in time. In that case Mr. Baron *Parke* says, "It was a question for the jury whether the letter was put into the Post Office in time for delivery on the 28th. The Post Office mark certainly raised a presumption to the contrary, but it was not conclusive. The jurors have believed the testimony of the witness who posted the letter, and the verdict was therefore right. If a party puts a notice of dishonor into the post, so that in due course of delivery it would arrive in time, he has done all that can be required of him, and it is no fault of his if delay occurs in the delivery." Mr. Baron *Alderson* says, "The party who sends the notice is not answerable for the blunder of the Post Office. I remember to have held so in a case on the *Norfolk* circuit, where a notice addressed to *Norwich* had been sent to *Warwick*. If the doctrine that the Post Office is only the agent for the delivery of the notice, was correct, no one could safely avail himself of that mode of transmission. The real question is whether the party has been guilty of laches."

There is also the other case which has been referred to, which declares the same doctrine, the case of *Adams v. Lindsell (b)*. That is a case where the letter went, by the error of the party sending it, to the wrong place, but the party receiving it answered it, so far as he was concerned, in proper time. The party, however, who originally sent the offer not receiving the answer in proper time, thought he was discharged, and entered into a contract and sold the goods to somebody else. The question

(a) 7 Mee. & Wels. 515.

(b) 1 Barn. & Ald. 681.


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was, whether the party making the offer had a right to withdraw after notice of acceptance. He sold the goods after the party had written the letter of acceptance, but before it arrived he said, "I withdraw my offer." Therefore he said, "before I received your acceptance of my offer I had withdrawn it." And that raised the question when the acceptance took place, and what constituted the acceptance. It was argued, that "till the plaintiff's answer was actually received, there could be no binding contract between the parties, and that before then the defendants had retracted their offer by selling the wool to other persons." But the Court said, "If that was so, no contract could ever be completed by the post, for if the defendants were not bound by their offer when accepted by the plaintiff's till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered, in law, as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter."

Those two cases leave no doubt at all on the subject. Common sense tells us that transactions cannot go on without such a rule, and these cases seem to be the leading cases on the subject; and we have heard no authority cited which in the least degree affects the principle on which they proceed. The law of *Scotland* appears to be the same as the law of *England*, for Mr. *Bell's* Commentary lays down the same rule as existing in *Scotland*, and nothing has been stated to us in contradiction of his opinion.

Now whether I take that proposition as conclusive upon the objection, or whether I consider it as a question entirely open, whether the putting the letter into the post was, or not, in time to constitute a valid acceptance, it ap-

pears to me that the learned judge was right in the conclusion to which he came, that he was right in the mode in which he left the question to the jury, and that he was not bound to lay down the law in the manner alleged in the bill of exceptions.

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The next exception is the third, which says, "In so far as his Lordship did not direct the jury in point of law, that if a merchant makes an offer to a party at a distance, by post letter, requiring to be answered within a certain time, and no answer arrives within such time as it should arrive, if the party had written and posted his letter within the time allowed, the offerer is free, though the answer may have actually been written and posted in due time, if he is not proved to be aware of accidental circumstances preventing the due arrival of the answer."

That, my Lords, raises first of all a proposition that does not arise in this case at all. It assumes a contract that requires an answer within a certain stipulated time, and it assumes (which is already disposed of by what I have said in answer to the second exception) that the putting a letter into the post is not a compliance with the requisition of the offer. But there is no special contract here, and therefore this exception cannot be maintained.

We have now come to the fourth exception, which I have already disposed of; and it therefore only remains to call your Lordships' attention to the fifth exception: that exception is, "in so far as his Lordship did not direct the jury in point of law, that in case of failure to deliver goods sold at a stipulated price and immediately deliverable, the true measure of damage is the difference between the stipulated price and the market price, on or about the day when the contract is broken, or at or about the time when the purchaser might have supplied himself."

That exception raises the proposition generally, and not, as the learned counsel have put it at the bar, on the absence of any proof of special damage. If that was the law,

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as almost every case must differ as to the amount of damage, and the circumstances which gave rise to that damage, no certainty could ever exist as to the law. The proposition here is, that if a party proposed to deliver goods at a certain time, the damage against him by a party who suffers by his default, is to be measured by the market price at or about the time of the failure of the contract. They say you are to take it within the time of the failure, or at the time when the failure takes place and the contract is broken. It is asserted as the rule of law, that that is the measure of damage that the party is to receive.

Now, in the action and the proceedings here for damage, the party comes to receive compensation for the damage that he has sustained. If there is a rule established that in a certain case a certain measure of damage alone ought to be given, the jury ought not to be permitted to go out of that general rule; but if it is a question in the breasts of the jurors, I do not understand how you can tell them that whether they give 1,000*l.* or 10,000*l.*, they have not done what is proper. The learned counsel for the appellants felt the force of that difficulty. What does the party come into Court for? To obtain compensation for the other party not having performed his contract. What was there for the pursuers to shew here? That they had, by the contract between themselves and the defenders, become entitled to 2,000 tons of pig iron, and that the defenders had subjected themselves to make compensation for the damage sustained by their breaking that contract. It is said that the judge should have told the jury that when the pursuers first heard that the defendants would not perform their contract, the pursuers might by their own activity have put themselves into a situation to sustain a smaller amount of loss than they have sustained here, and that they are not entitled to recover more than that smaller amount. But were the pursuers bound to do this? They had entitled themselves to 2,000 tons of pig

iron; the jurors had to ascertain the damage that had arisen from the non-fulfilment of this contract, and, in my opinion, they have properly performed the duty that belonged to them in ascertaining the amount of that damage. Suppose, for instance, a party who has agreed to purchase 2,000 tons of pig iron on a particular day, has himself entered into a contract with somebody else, conditioned for the supply of 2,000 tons of pig iron to be delivered on that day, and that he, not being able to obtain those 2,000 tons of pig iron on that particular day, loses the benefit arising from that contract. If pig iron had only risen a shilling a ton in the market, but the pursuers had lost 1,000*l.* upon a contract with a railway company, in my opinion they ought not only to recover the damage which would have arisen if they had gone into the market and bought the pig iron at that increased price, but also that profit which would have been received if the party had performed his contract. No other rule is reconcilable with justice, nor with the duty which the jury had to perform—that of deciding the amount of damage which the party has suffered by the breach of his contract. Most cases of contract vary from each other, and whatever general rules there may be as to awarding damages, they must be modified by the particular cases to which they come to be applied.

We have nothing to do here but to look to the law of *Scotland*, and by the case of *Watt v. Mitchell* (*a*), no doubt is left as to what is the rule of law in *Scotland*, namely, that the measure of damages is a question for the jury upon the circumstances of each particular case. Lord *Medwin*, in that case, goes very laboriously through all the early authorities in *Scotland* on the subject, and after having done so, draws this result from those early authorities; he says (*b*), “these are all the *Scots* cases referred to, and I certainly deduce from this that our Court rejects

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(*a*) Cas. in Ct. of Session (1839), 1157.      (*b*) *Id.* 1163.

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the plea of the defenders, that the price at the time of the delivery, as the time when the breach of contract takes place, should be the measure of the damages due, where the defender has failed to implement." He, therefore, in terms, on the authority of the many cases he refers to, ultimately lays down, that that is not the law of *Scotland*; that the law of *Scotland* is to look into all the circumstances; that the law of *Scotland* will do what now a jury is called on to do *there*, or what a jury is called on to do *here*, to effectuate and sanction the re-imbursing of the party who has sustained loss by the original contract, and that without reference to what the price of the article at the particular time will produce.

In what I have now said I have wished to confine myself to the law of *Scotland*; I have not had an opportunity of saying anything on the subject of the law of *England*. I am contemplating now what I find to be the established law of *Scotland*, and the question is, whether in the face of that law, and in defiance of all the authorities referred to in the law of *Scotland*, and in the absence of any authorities in the law of *Scotland* raising a contrary proposition, your Lordships are to adopt a principle which would go to destroy that rule, and to lay down another, which, according to my opinion, is less calculated to do justice to all parties than the one upon which the Court has proceeded. It is very desirable, no doubt, that the law between the two countries should be assimilated. But that is no ground why your Lordships should introduce into the law of *Scotland* a rule, which, if your Lordships were to introduce, would do great violence to the law of *Scotland*, and which you do not altogether approve of here. My Lords, I think that the learned judge most properly, at the trial, decided that he was not bound to put the questions in the way the defenders suggested, and that there was sufficient to lead him to the

conclusion at which he arrived, that the jurors were at liberty to look into all the circumstances for the purpose of measuring the damage.

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I believe that in these remarks I have exhausted the whole of the objections made, and my advice to your Lordships is to affirm the judgment of the Court from which this is appealed.

It was ordered that the interlocutor complained of should be affirmed, with costs.



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WILLIAM BOUGHTON, JOHN HENRY  
BOUGHTON, and FREDERICK WINTLE } *Appellants.*  
BOUGHTON - - - - }

WILLIAM BOUGHTON, JOHN JAMES, and  
JOHN JAMES the Younger, The Rev.  
JOHN PROSSER and his Children, HENRY  
K. WHITHORN and Wife, JOHN BOUGH-  
TON, ALICIA JOYCE BOUGHTON, JANE } *Respondents.*  
BOUGHTON, EDWARD VAUGHAN BOUGH-  
TON, GEORGE HOUGH and LUCY his Wife,  
MARY JANE BOUGHTON, ELIZABETH  
JONES BOUGHTON, and ELLEN YOUNG  
BOUGHTON - - (First Appeal) }

AND

WILLIAM BOUGHTON (the first above-  
named Respondent) - - - } *Appellant.*

JOHN JAMES, and all the other above-  
named Respondents and Appellants } *Respondents.*  
(Second Appeal) - - - }

*Will.*  
*Construction.*  
*Pruteness.*

A testator, after devising and bequeathing all his real and personal estates to trustees, on trust, from time to time to receive the rents and profits, and therewith to pay various legacies and annuities, directed that they should invest the surplus rents and profits at interest, and suffer the same to accumulate: and he declared that they should stand seised of his said trust estate and the accumulations, upon trust, that when and as soon as any son of either of his nephews, *A.* and *B.*, should have attained the age of twenty-five years, a valuation of his said trust estate should be made, and that the same should then be divided into as many equal lots as there should be sons of his said nephews then living, and thenceforth separate accounts should be kept of the respective portions; and that each of his said nephews' sons, when and as they should re-

spectively arrive at the age of twenty-five years, should choose one of such portions as the share to be allotted to him and his children, and that thenceforth the said portion or share should be held by trustees, upon trust for the person so selecting the same for his life, and after his decease upon trust, as to one equal moiety, for his eldest son, and his heirs, executors, &c. ; and as to the other moiety for the rest of his children, and their heirs, executors, &c., in equal proportions, and if but one child, both moieties for such child absolutely ; but if any or either of his said nephews' sons should die under their respective ages of twenty-five years, or having attained that age should afterwards die without leaving issue, the share or shares intended for the person or persons so dying should go to the others and other of the said nephews' sons ; and if all but one should die without leaving issue, the trustees should stand seised and possessed of the whole trust estate, in trust for such one surviving nephew's son for his life, and for his children and child as aforesaid ; but if all the testator's said nephews' sons should depart this life without leaving issue, then upon trust for such person as should at that time be the testator's heir. At the time of the testator's death, *A.* and *B.* had several sons living, and *B.* had another son born afterwards :—

Held, upon the construction of the will, that the trusts for accumulation and division of the property comprised all the sons of the nephews, who should be living when the first of them should attain twenty-five ; and as the son who should first attain that age might not be born until after the testator's death, the gifts were too remote, and therefore void : And the testator's real estates upon his death became vested in his heir.

Held secondly, that under a bequest of real and personal estates, upon trust to receive the rents and profits, and to pay legacies and annuities, and vest the surplus rents, &c., for other purposes, the personal estate is the primary fund liable to the payments, there being no direction to discharge it, or to sell the real estate, so as to constitute a mixed fund.

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*Personal estate the primary fund for legacies.*

THE suit, which gave rise to these appeals, was instituted by the respondent, *William Boughton*, as the heir-at-law

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and customary heir of the Rev. *William Boughton*, claiming his real estates, on the ground that the trusts declared thereof by his will were void for remoteness.

The testator, by his will, dated the 1st of *July*, 1831, devised and bequeathed unto *John James* the elder, and *John James* the younger, their heirs, executors, &c., all his messuages, lands, tenements, and hereditaments real, and all other his personal estate and effects, upon the trusts and subject to the annuities and charges after in his will or any codicil thereto, bequeathed, "that is to say, upon trust from time to time to receive the rents, issues, interests, dividends, and profits thereof, and to retain thereout every year the sum of 10*l.* as some remuneration for their trouble."

The testator, after declaring trusts for the investment and payment of the legacies in the will mentioned, and, in particular, a legacy of 1500*l.* for the benefit of his niece, *Elisabeth Prosser*, and her husband, the Rev. *John Prosser*, and their children; and a legacy of 1500*l.* for his niece, *Susannah*, wife of *Henry K. Whithorn*, for her separate use, proceeded to declare further trusts as follows :—

"And also upon further trust to pay to and for the use, education, and maintenance of each of the daughters of my two nephews, *John Boughton* and *Joseph Boughton*, whether born in my lifetime or afterwards, the yearly sum of 40*l.* a-piece, until they shall respectively attain the age of twenty-five years, or be married with the consent of their respective parents or surviving parent, and on their respectively attaining that age or being previously married with such consent as aforesaid, in trust to pay each of them the sum of 1500*l.* for their respective uses and benefit."

The testator then, after declaring trusts for the payment of six life annuities, amounting together to 1180*l.*, and for payment out of his personal estate of a legacy of 100*l.* to

the Society for Promoting Christian Knowledge, 100*l.* to the Society for Propagating the Gospel in Foreign Parts, and 100*l.* to the treasurer of the *Gloucester* Infirmary, proceeded thus:—"And I do direct that my said trustees, or the survivor, &c., do and shall, out of the rents and profits of my said trust estate and premises, pay the following sums for the education, maintenance, or benefit of each of the sons of my said nephews, *John Boughton* and *Joseph Boughton*; that is, the sum of 30*l.* a-piece per annum, till they respectively attain the age of ten years; the sum of 50*l.* a-piece per annum from that age, till they respectively attain the age of fifteen years; the sum of 80*l.* a-piece per annum from that age, till they respectively attain the age of eighteen years; and from that age the sum of 150*l.* a-piece per annum, till they respectively attain the age of twenty-five years; but in the event of the death of any or either of them under such respective ages, the provision intended for such one, &c., shall no longer be paid or payable."

"And I direct my said trustees to invest all and singular the surplus of the rents, issues, and profits of my said trust estate and premises (if any), after payment of the several annuities, legacies and charges hereinbefore expressed, at interest, in the name or names of my said trustees or trustee for the time being, in or upon Government security, and to suffer the same to accumulate: And I declare my will and mind to be, that they do and shall stand seised of my said trust estate, and the accumulations thereof, subject as aforesaid, upon the further following trusts (that is to say): upon trust, *when and so soon as that any son of either of my said nephews, John Boughton and Joseph Boughton, shall have attained the age of twenty-five years, a valuation of my said trust estate, subject as aforesaid, shall be made*" (by the trustees, or such persons as they should appoint) "and that the same shall be then divided into as many equal lots or shares as

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 BOUGHTON and others *and that thenceforth distinct and separate accounts shall*  
*v.* *be kept of the respective portions; and that each of my*  
 BOUGHTON *two nephews' sons, subject to the proviso hereinafter con-*  
 and others, *tained, when and as they shall respectively arrive at the*  
 and *age of twenty-five years, shall choose one of such portions*  
 BOUGHTON *as the share or property to be allotted for him and his*  
*v.* *children as hereinafter mentioned, and that thenceforth*  
 JAMES *the said portion or share shall be held by my said trustees*  
 and others. *or trustee for the time being, or shall be by him or them,*  
*by good and effectual conveyances and assurances in the*  
*law, conveyed and transferred to two or more proper trus-*  
*tees" (to be nominated by the nephews' sons, respectively,*  
*and approved of by the trustees), "upon trust for the per-*  
*son so selecting the same for his life; and from and after*  
*his decease, upon trust, as to one equal moiety, for his*  
*eldest son and his heirs, executors, and administrators;*  
*and the other moiety for the rest of his children and their*  
*heirs, &c., in equal shares and proportions; and if but*  
*one, both moieties for such child, his or her heirs, execu-*  
*tors, or administrators absolutely."*

Then followed a declaration that if any of the nephews' sons should die under twenty-five, or after that age, without leaving issue, their shares should go to the survivors equally, in addition to their original shares, and subject to the same contingency and accruer; and if all the nephews' sons but one should die without leaving lawful issue, then the trustees should stand seised and possessed of the whole of the trust estate and premises, subject as aforesaid, in trust for such one surviving nephew's son for his life, and for his children or child as aforesaid; but if all the nephews' sons *should die without leaving lawful issue*, then upon trust for such person or persons as *should at that time be the testator's heir at law*, and to whom, in such event, he devised and bequeathed all his real and personal estate and the accumulations thereof, absolutely.

The testator, after directing that in the apportionment of the trust estates, the eldest son of his nephew *John*, and the eldest son of his nephew *Joseph*, who should respectively attain the age of twenty-five, should have the option of choosing certain estates (which he named) to be conveyed to them respectively, upon the trusts aforesaid, and in case these estates should exceed in value their equal portions, that the difference should be respectively charged on them, appointed the said *James* the elder, and *James* the younger, executors of his will.

The testator afterwards, on the same 1st of *July*, 1831, made a codicil, and thereby,—after reciting that by his will he had, after bequeathing certain legacies and annuities, directed his trustees to divide his real and personal estate, in the event in his will mentioned, into as many equal lots or shares as *there should be sons* of his two nephews then living, in order that each such son should, for his life, have the rents, issues, and profits of one lot or share of his real and personal estate,—he directed the trustees in his will named, or the trustees to whom the several and respective shares of his trust estate should be conveyed, or transferred, as in his will mentioned, to pay out of the interest or dividends of the *personal estate*, which should be payable to each of the sons of his nephews for the first year after they should severally attain the age of twenty-five years, the sum of 50*l.* to the treasurer of the *Gloucester* Infirmary, for the benefit of that institution, such payment to be made on account of the sons of his nephews, and to the end that they might thereby be and become governors of the said institution.

The testator died, without issue, in *August* 1831, leaving his said two nephews, his sister, *Ann Boughton*, and three nieces, Mrs. *Prosser*, Mrs. *Whithorn*, and Mrs. *Wintle*, his only next of kin.

At the time of the testator's death, his nephew, *John*

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*Boughton*, who was then his heir at law and customary heir, had two sons and three daughters, and no more, then living, namely, *William Boughton*, the respondent in the first appeal (born the 15th of *September*, 1814), *John Boughton*, another of the respondents (born the 17th of *June*, 1819), *Ann Boughton*, since deceased, and the respondent, *Jane Boughton*, and *Elizabeth*, since deceased. Their father died in *January* 1834, intestate, without having had any other child.

At the time of the testator's death, his second nephew, *Joseph Boughton*, had four sons and two daughters then living, namely, the three appellants (born respectively in *September* 1822, *June* 1824, and *March* 1831), and *Joseph Boughton* (born in 1827, and since deceased), and the respondents, *Lucy*, wife of Mr. *Hough*, and *Mary Boughton*. He, the said *Joseph*, had, after the testator's death, another son and two daughters, namely, the respondents, *Edward Vaughan Boughton* (born in *June* 1835), and *Elizabeth* and *Ellen Boughton*, and died intestate in *September* 1839.

On the death of the nephew, *John Boughton*, the respondent, *William Boughton*, became his heir at law and customary heir, and also the heir at law and customary heir of the testator. In *October* 1839, he filed his bill in Chancery against the other respondents (including the said trustees and executors) and the appellants, and also against Mrs. *Prosser* and Mrs. *Wintle*, since deceased, stating, among other things, as or to the effect hereinbefore stated, and praying a declaration that the trusts declared by the said will of the testator's real and personal estates, and the surplus rents, issues, and profits thereof, after paying the annuities, legacies, and charges by the will created, were void, as being too remote; and that such real estates (subject to a proper proposition of the said annuities, legacies, and charges, in case, and to

the extent only, of a deficiency of the personal estate to satisfy the same), and the investments and accumulations made from the surplus rents, issues, and profits thereof, since the death of *John Boughton*, the nephew, had become vested in the respondent, *William Boughton*, as the heir at law and customary heir of the testator; and that the investments and accumulations of such surplus rents and profits might be ascertained, and so much thereof as should be found to have been derived from the testator's real estates since the decease of his nephew, *John Boughton*, might be ordered to be paid to the said respondent; and that the real estates, subject to so much, if any, of the several subsisting annuities, legacies, &c., charged by the will on the testator's real and personal estates, as the personal estate might be insufficient to satisfy, might be conveyed to the respondent; and that it might be ascertained whether the testator's real estates or the rents and profits thereof had been applied in payment of the said several annuities, legacies, and charges in relief of the personal estate; and if it should so appear, then that the real estate might be recouped out of the personal estate of the testator, &c.

The several defendants to the bill put in their answers thereto, and the appellants (who are the surviving sons of the nephew, *Joseph Boughton*, born in the testator's lifetime), being infants, put in the usual answer, submitting their rights and interests to the care and protection of the Court.

There were afterwards bills of revivor and supplement by reason of the deaths of parties. The causes coming on to be heard in *December* 1841, before Vice Chancellor *Knight Bruce*, a decree was made referring it to the Master to make the usual preliminary inquiries.

The Master made his report in *July* 1843, and thereby found the facts as to the next of kin, the heirship and

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customary heirship of the testator, and the deaths of his two nephews and who were their sons and daughters to the effect before stated; and he found that, of the next of kin, all except Mrs. *Whithorn* were dead, and that the respondent, *James*, the younger, was the personal representative of *Ann Boughton* and of Mrs. *Wintle*; that the respondents, *Alicia Joyce Boughton*, *Lucy Boughton*, and *John Prosser* were the respective legal personal representatives of *John Boughton*, *Joseph Boughton*, and Mrs. *Prosser*.

The causes came on to be heard before Vice Chancellor *Knight Bruce*, for further directions, and on the Master's report, on the 28th of *February*, 1844 (a), when his Honor made a decree by which it was declared; 1st, "That the trusts declared by the said will of and concerning the real, copyhold, customary, and personal estates, thereby devised and bequeathed, and the surplus rents, issues, and profits and accumulations thereof, subject to and after paying the several annuities, legacies, and charges by the will given or created, were void, as being too remote."

2ndly. "That the trust or bequest in the will, to pay to each of the daughters of the testator's two nephews, *John Boughton* and *Joseph Boughton*, whether born in the testator's lifetime or afterwards, the sum of 1,500*l.*, for their respective uses and benefit, on their respectively attaining the age of twenty-five years, or being previously married with such consent as therein mentioned was void, as being too remote, with respect only to such of the daughters of the testator's said nephews respectively as came into existence after his death."

3dly. "That the trust or bequest in the said will to pay to and for the use, education, and maintenance of each of the daughters of the testator's said two nephews, whether

(a) 1 Collyer, p. 26.

born in the testator's lifetime *or afterwards*, the yearly sum of 40*l.* a-piece, until they should respectively attain the age of twenty-five years or be married with the consent therein mentioned; and the trust or bequest to pay the various sums in the will mentioned for the education, maintenance, and benefit of *each of the sons* of his said nephews, at and from the different periods therein mentioned, are valid trusts or bequests, and ought to be carried into execution; and that this last trust or bequest extends to, and comprises sons of the nephews, *whether born in the testator's lifetime or afterwards.*"

4thly. It was declared "that, according to the true construction of the said will, the annuities and legacies thereby given, except the legacies directed to be paid out of the personal estate, were thereby charged upon the testator's personal estate and his freehold, copyhold, and customary estates; and that such legacies and annuities, except the legacies directed to be paid out of the personal estate, and also except the legacies given for the benefit of the poor of the parishes of *Blockley* and of *Westbury* respectively, ought to be paid out of the said personal estate, and the freehold, copyhold, and customary estates, *pari passu*, according to their respective values."

And, 5thly, It was declared "that the real copyhold and customary estates, subject to a proper proportion of such of the annuities and legacies as, according to the last declaration, ought to be paid out of the testator's personal estate and his freehold copyhold and customary estates, *pari passu* (such proportion to be ascertained as after directed), and also so much of the surplus rents, issues, and profits as accrued from the real copyhold and customary estates since the death of the testator's nephew, *John Boughton*, and the investments and accumulations thereof (subject to the rateable contribution, which, according to the declaration aforesaid, ought to be paid thereout in respect of the said annuities and legacies, the amount of such contribu-

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tion to be ascertained as after directed), had descended to and become vested in the plaintiff (the respondent, *William Boughton*), as heir-at-law and customary heir of the testator. And it was declared that the surplus rents, issues, and profits of the freehold, copyhold, and customary estates, which accrued in the lifetime of *John Boughton*, the nephew (subject to such rateable contribution as aforesaid), and the investments and accumulations thereof, belonged to and formed part of his personal estate."

The decree proceeded to give various directions to the executors, and to direct further inquiries before the Master, consequential on the said declarations.

The first appeal was brought by the surviving sons of the testator's nephew, *Joseph Boughton*, born in the testator's lifetime, against so much of the decree as declared that the trusts declared by the will of the real and copyhold and personal estates, and the surplus rents, issues, and profits, and accumulations thereof, subject as in the decree mentioned, were void as being too remote, and against the directions consequential on such declaration; and against so much thereof as declared that the trust or bequest for the maintenance of the sons of the two nephews extended to sons, whether born in the testator's lifetime or afterwards; and as declared that the legacies and annuities ought to be paid out of the personal estate and the freehold copyhold and customary estates, *pari passu* (which is the subject of the second appeal); and as declared that the real copyhold and customary estates, and also so much of the surplus rents, &c., as were in the decree in that behalf mentioned, and the investments and accumulations of such rents and profits since the death of the nephew, *John Boughton*, subject as therein mentioned, had descended to and become vested in the respondent *William Boughton*, as heir-at-law and cus-

tomary heir of the testator, and that the surplus rents, issues, &c., and the investments and accumulations thereof, before the death of the said *John Boughton*, formed part of his personal estate, &c.; and against the directions consequential on those declarations

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The second appeal was brought by *William Boughton*, the heir-at-law of the testator, and first respondent in the first appeal, against so much of the decree as declared that the testator's real and copyhold estates were subject to the payment of his legacies and annuities, *pari passu*, with the personal estate, and against the directions consequential thereon (as in the fourth declaration, *ante*, p. 415).

Mr. *Hodgson* and Mr. *Bethell* (Mr. *Chandless* was with them), for the appellants :

The declarations contained in the Vice Chancellor's decree, *first*, that the trusts of the real and personal estates, and of the surplus rents and profits, and the accumulations thereof, are void for remoteness ; and *thirdly*, that the bequests for the education and maintenance of the sons of the two nephews of the testator extended to sons, whether born in the testator's lifetime or afterwards, are erroneous. It is clear, upon the true construction of the will, that such sons only of the nephews as were in existence at the testator's death, would be entitled to the bequests "for the education, maintenance, and benefit of each of the sons of my said nephews." That construction, plainly arising from these words taken by themselves, is confirmed by the circumstance, that, in this bequest, the words of futurity contained in the bequest for the education and maintenance of the daughters of the nephews, "whether born in my lifetime or afterwards," are omitted. That distinction between the two bequests is decisive, that after-born sons were not contemplated, and are not comprised in this bequest, and therefore the Vice Chancellor's declaration on that point must be varied.

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If then, as it is confidently submitted, the trust for the education and maintenance of the sons of the nephews extend only to those sons who were born in the testator's lifetime, they must be the same sons, and not a different and larger class, to whom shares are given in the real and personal estates, and the accumulations of the rents and profits under the subsequent trust, "when and so soon as that any son" of either of the nephews should have attained the age of twenty-five years (a). No expression is found in the whole of this trust concerning the residue of the real and personal estates and the accumulations of them, nor in any other part of the will, affording any ground for the Vice Chancellor's declaration that the trust comprised sons born after the testator's death.

But independently of the reasons and inferences derived from the different manner, in which the several bequests for the maintenance and education of the sons and of the daughters of the nephews are expressed in this will, it is a general rule of construction that a gift to a class vests in such persons only as constitute the class at the time of the testator's death; *Dodson v. Hay* (b); *Farmer v. Francis* (c); *Kevern v. Williams* (d). But here, it is said, there is no prior particular estate, and the words "each of the sons of my said nephews" are ambiguous expressions, and must be held to include all the sons, not only those whom the nephews had at the time of the will, but those also whom they might afterwards have, as in *Bateman v. Roach* (e), and other cases of that class. The rule against perpetuities is not questioned here; that is too well established to contend against it; and its validity and stringency were enforced in recent decisions of this House; *Cadell v. Palmer* (f); *Lord Dungan-*

(a) *Vide supra*, p. 409.

(d) 5 Sim. 171.

(b) 3 Bro. C. C. 404.

(e) 9 Mod. 104.

(c) 2 Bing. 151; S. C.,  
 2 Sim. & Stu. 505.

(f) 1 Clark & F. 372.

*nam v. Smith* (g) ; but restriction, and not extension, of the rule is the practice in equity, while the courts of law try to escape from it altogether.

The trusts in this case depend on the vesting of the gifts ; the rule applicable to them is pointed out by Chief Justice *Best* in communicating to this House the opinions of the judges in *Duffield v. Duffield* (h) ; “ Until these estates become vested, they and the rents derived from them pass to the heir-at-law of the testator as estates not disposed of by the will. Whilst estates remain contingent, those in whom they are at a future time to be vested have no interest in them or the rents and profits. Such estates must descend to the heir, if they are not given to any person to hold until the events happen, on which they are to become vested,” &c. “ Testators that create contingent estates often forget to make any provisions for the preservation of them, and for the disposition of the rents and profits in the intermediate period between their deaths and the vesting of their estates. In such cases the estates descend to the heirs,” &c. “ If the parents attaining a certain age, be a condition precedent to the vesting the estates, the children, by the death of these parents before they are of that age, lose estates which were intended for them,” &c. “ In consideration of these circumstances, the judges, from the earliest times, were always inclined to decide that estates devised were vested ; and it is the established rule in construing devises that all estates are to be holden to be vested, except when there is a condition precedent to the vesting, so clearly expressed, that the courts cannot hold the estates to be vested without deciding in direct opposition to the tenor of the will ; but if there be the least doubt, advantage is to be taken of the circumstances,” &c. There is a class of cases in support of that doctrine, as *Whitbread v. Lord St. John* (i).

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(g) 12 Clark & F. 546.

(i) 10 Ves. 152.

(h) 1 Dow & Clark, 310—11.

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By holding in this case, that the gifts vested in the children that were living at the time the eldest of them attained twenty-five, the House will give effect to the testator's intention, and save his will. That construction is certainly opposed to the case of *Leake v. Robinson* (*k*), which has never been impeached, but is not inconsistent with *Mogg v. Mogg* (*l*), a prior decision by the same judge. There are numerous decisions on this point, besides *Dodson v. Hay* (*m*) and *Farmer v. Francis* (*n*); *Murray v. Addenbrook* (*o*), *Bingley v. Broadhead* (*p*), and *Bland v. Williams* (*q*), are very strong cases in favor of vesting, and against failure for remoteness; but there is a still stronger case of *Doe v. Ward* (*r*), with which, as well as the last mentioned cases, the judgment, which is the subject of this appeal, is wholly irreconcilable. The rules of construction stated by Mr. *Jarman*, in his edition of *Powell on Devises* (*s*), "words occurring more than once in a will shall be presumed to be used in the same sense, unless a contrary intention appear by the context, or unless the words be applied to a different subject," &c., are to be applied here; and the word "sons" in the trust of the accumulations, and division of them among sons attaining twenty-five, must be read the "said sons," or "such sons," as were before mentioned in the gift of the annuities, meaning the same and not a different class; *Trickey v. Trickey* (*t*); and *Ellicombe v. Gompertz* (*u*). These cases were not referred to in the argument before the Vice Chancellor. There, as here also, the argument was (*v*) that the testator, in the gift of annuities and legacies to the daughters

(*k*) 2 Meriv. 363.

(*l*) 1 Meriv. 654.

(*m*) 3 Bro. C. C. 404.

(*n*) 2 Bingh. 151.

(*o*) 4 Russ. 407.

(*p*) 8 Ves. 415.

(*q*) 3 Myl. & K. 411.

(*r*) 9 Adol. & E. 582.

(*s*) 2 Vol., p. 8, *et seq.*

(*t*) 3 Myl. & K. 560.

(*u*) 3 Myl. & C. 127. See other cases there cited.

(*v*) 1 Col. 39, 40.

of his nephews, expressly mentioned daughters "then born or afterwards to be born," but omitted the latter words in the gift of annuities for the education and maintenance of the sons: and from that omission the legitimate inference was, that in the subsequent trust for the accumulations and division of the property among the sons who should attain twenty-five, the testator meant the same sons for whom he had before provided the annuities, and who were the sons born at his death. That argument was supported by the citation from *Jarman on Wills* (w), and by the cases of *Singleton v. Gilbert* (x) and *Love v. L'Estrange* (y), to which is now added the late case of *Kevern v. Williams* (z), between which and the present case there is no material distinction.

But whether the class of sons be confined to such only as were living at the death of the testator, or be considered as comprehending such only as might come into *esse* before the first should attain the age of twenty-five years, it is submitted that according to the true construction of the will, regard being had especially to the gift over to the testator's heir-at-law, each individual of either class would, immediately on the testator's death, or on his own birth, take an estate vested in interest, though postponed with respect to the period of enjoyment. And as the testator declared his intention that his heir-at-law should take an interest in his real and personal estates, only in the event of all his nephews' sons departing this life without leaving lawful issue them surviving, the sons of the nephews take, by implication, interests if not absolute, at least for life, in such real and personal estates, and the accumulations of them.

The appellants, assuming that so much of the Vice

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(w) Vol. 2, p. 74, *et seq.*

(x) 1 Cox, 68.

(y) 5 Bro. P. C. 59.

(z) 5 Sim. 171.



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Chancellor's decree as declared that the trusts of the will concerning the real and personal estates and the accumulations of them are void for remoteness, is erroneous and must be reversed, further, and in that event, complain of his Honor's declaration that the annuities and legacies ought to be paid out of the real and personal estates, *pari passu*, according to their respective values, and of the directions consequential on that declaration. But they submit that, unless the first declaration be reversed, the latter, against which the respondent *William Boughton* also has appealed, ought to be affirmed.

Mr. *J. Parker* and Mr. *Lloyd*, for *W. Boughton*, the heir-at-law, the principal respondent in the first appeal, and sole appellant in the second :

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The Vice Chancellor stopped the argument against the validity of the trusts of the accumulations, observing that *Hunter v. Judd (a)*, decided the point ; and though his Honor afterwards heard it argued, he repeated, in his judgment, that he entertained no doubt on it. There can be no difference of opinion on the general principles applicable to this case, that in gifts to a class, if the period of vesting exceeds twenty-one years from the death of one or more persons living at the death of the testator, the gifts are void for remoteness. It was the express intention of this testator that his gifts to the grand-nephews should not come into their enjoyment until the first attained the age of twenty-five years. The grand-nephew first attaining that age might not be born at the testator's death. In *Leake v. Robinson (b)*, in which the same question arose, Sir *W. Grant* says, " the first point to be determined is, who are included in the description of brothers and sisters of *W. R. Robinson* and of children of Mrs. *Robinson* ; whether those only who were in being at

(a) 4 Simons, 455.

(b) 2 Meriv. 382.

the time of the testator's death, or all who might come *in esse*, during the lives of the respective tenants for life. Upon that point I do not see how a question can possibly be raised." "Indeed, I believe wherever a testator gives to a parent for life, with remainder to his children, he does mean to include *all the* children such parent may at any time have." According to the plain grammatical interpretation of this testator's will, from which there is neither necessity nor reason to deviate, the trust or bequest declared of his real and personal estates, and the surplus rents and profits thereof, comprehends sons of his two nephews, whether born in his own lifetime or afterwards. There are numerous decisions establishing that construction, besides *Hunter v. Judd*. There is no conflict between that case and the previous decision of the Vice Chancellor in *Titcomb v. Butler (a)*.

Even if the testator's intention was clear in this case, that all his grand nephews should take shares, that would have no weight with a court of construction, which, in applying the rules of construction, disclaims all regard to the intentions of testators. In *Jee v. Lord Audley (b)*, Lord *Kenyon*, after stating the settled principle, says he would not "strain it to serve an intention, at the expense of removing the landmarks of the law." The judgment in that case is in all respects applicable to this. The cases of *Farmer v. Francis (c)*, and *Kevern v. Williams (d)*, cited for the appellants, are of doubtful authority; no reasons are given for the judgment in the latter; and as to *Dodson v. Hay (e)*, *Murray v. Addenbrook (f)*, and *Lord Dungannon v. Smith (g)*, they are all distinguishable from this case. The judgment of Sir *J. Leach*, in *Bland v. Williams (h)*, also cited for the appellants, is

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(a) 3 Sim. 417.

(b) 1 Cox, 324.

(c) 2 Bing. 151.

(d) 5 Sim. 171.

(e) 3 Bro. C. C. 404.

(f) 4 Russ. 407.

(g) 12 Clark & F. 546.

(h) 3 Myl. & K. 411.

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not generally approved of, as it clashes with Lord *Gifford's* judgment in *Bull v. Pritchard* (i), which has been upheld by Vice Chancellor *Wigram* upon a new bill (j) with reasons applicable to this case. He says (k) "there are two classes of cases, one, where the devise is to a party at a given age, and the property is given over if the devisee dies under that age; the other where the description of the devisee is such as to make the given age part of the description, &c. In the second class the court has held the devise contingent upon the ground that no one could claim who was not of the age required, that otherwise he did not answer the description." And his Honour adds, that a clause for maintenance and education cannot be allowed to have any effect upon the description of the devisee, the devise not being "to the children at, in, when, or if, but in effect to such only as attain the age of twenty-three years." In *Doe v. Ward* (l), which is much relied on by the appellants' counsel, it was held that under a devise to *S.* for life, and after her death to such of her children as she had or might have, if a son or sons, at his or their age or ages of twenty-three, the rents to be applied in the mean time to their maintenance and education, the surviving children of *S.* took vested interests at her death, and the devise was not void for remoteness. That case is cited in *Newman v. Newman* (m), and the Vice Chancellor said it fell with the terms of *Boraston's Case* (n), and the other cases of the same class, in which there was a gift to a party "at, when, or if" that party should attain a particular age; those words being held to be used to point out the time at which the devisee was to take in possession, whereas in the case then before him there was no gift except to such of the testator's grandchildren as should attain the age of twenty-four, and his Honour held that gift void

(i) 1 Russ. 213.

(j) 5 Hare, 567.

(k) *Id.*, p. 571.

(l) 9 Adel. & E. 582.

(m) 10 Simons, 51.

(n) 3 Co. Rep. 19.

for remoteness. That case resembled this, but *Doe v. Ward* does not. In a later case, *Watson v. Hayes* (a), a testator devised his estate to trustees to sell the same, and vest the proceeds in real securities, to be disposed of as follows:—That his executors should pay 25*l.* a-year for the maintenance of his daughter till she should attain twenty-one, or be married, “when” they were required to pay her 500*l.* The legatee died before twenty-one or marriage, and the Lord Chancellor, reversing part of the Vice Chancellor’s decree, declaring the 500*l.* to have vested in the legatee, said “there was no gift of the 500*l.*, except in the direction to pay that sum to the daughter when she shall attain twenty-one, or be married. ‘When,’ applied to the gift itself, and not to the time of payment, to which Sir *W. Grant’s* judgment in *Hanson v. Graham* (b), is directly applicable; and there is also the absence of any terms of gift, except in the direction to pay at a time which never arrived, or in an event which never took place, to which Sir *W. Grant’s* observations in *Leuke v. Robinson* (c) directly apply, and which doctrine has been frequently recognised as a settled rule.” His Lordship then discusses the effect of the gift of 25*l.* a-year for maintenance on the vesting of the 500*l.*, and comes to the conclusion that the 25*l.* a-year was not a gift of the interest of the legacy of 500*l.*, which would effect the vesting of the legacy according to the last mentioned cases, and the case of *Vawdry v. Geddes* (d), but a distinct gift for maintenance, which therefore had no effect upon the vesting of the gift of 500*l.*

These cases govern the construction of the trusts of the will in the present case, where an accumulation of the surplus rents and profits of real and personal estate is directed to be made, until some son of the testator’s nephews

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(a) 5 Myl. & C. 125.

(b) 6 Ves. 235.

(c) 2 Meriv. 387.

(d) 1 Russ. & M. 208.

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should attain the age of twenty-five years. Until that event, which might not happen until the expiration of the lives in being at the testator's death and twenty-five years afterwards, nothing is given, either to be vested or enjoyed. The will contains no provisions, which can either, expressly or by implication, confer a vested interest in the residuary estates, or the accumulations of the surplus rents, until the time when the accumulations are directed to cease, and until then, the class of persons among whom the division is to be made is not ascertainable.

With reference to that passage of the will preceding the trust for the testator's heir-at-law, (*viz.*, "And if all such nephews' sons but one should die, without respectively leaving lawful issue them surviving, then the trustees should stand seised and possessed of the whole of the trust estate, for such surviving nephew's son, for his life and for his children; but if all the nephew's sons should die without leaving lawful issue surviving, then upon trust for such person as should at that time be the testator's heir at law,") upon which the counsel for the appellants contended that they take life estates by implication; it is confidently submitted that such an interpretation is inconsistent with the general scope of the will, and is therefore inadmissible. The ultimate gift is not to the heir-at-law of the testator, but to the person who should be his heir at the time when the ultimate gift should take effect. The whole series and order of limitations, relating to the testator's real and personal estate, and the surplus rents and profits, is postponed for a period which, in the event, might have transgressed the limits permitted by law.

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The question in the second appeal is, whether the testator's personal estate is not the fund primarily liable to the payment of the annuities and other legacies given by his will, to the exemption, in the first instance, of his real estate, which the decree adjudged to belong to this appel-

lant. This question, like that in the first appeal, is a question of construction. The general rule in the administration of assets in courts of equity is that, in the absence of express declaration or necessary inference, the personal estate shall be first applied in satisfaction of those charges which are thrown by the will on both the real and personal estates; *Harewood v. Child* (a), *Lord Inchiquin v. French* (b), *Samuel v. Wake* (c), *Bootle v. Blundell* (d), *Rhodes v. Rudge* (e), *Roberts v. Roberts* (f). This rule is properly applicable to all cases in which a testator making his real and personal estate the fund out of which debts and legacies or annuities are to be paid, is silent as to the order in which they shall be applied; for, although the question to be determined in cases of this kind is a question of intention, yet the intention is to be collected, not merely from the language of the will, but from its language in connection with the general rule that determines the order of application of real and personal assets. Several legacies given for charities by this will are directed to be paid out of the personal estate, because the testator knew the real estate could not be properly charged with them. No inference can be drawn from that direction to exempt the personalty from the other legacies. No directions being given as to the order in which the real and personal estates should be applied in discharging the other legacies, the fair legal inference is, that it was not the testator's intention to exclude the application of the general rule.

The rule was first departed from in *Roberts v. Walker* (g), by Sir J. Leach admitting, that "in order to throw upon the real estate any part of the burthen, to which the personal estate is primarily liable, the intention of the testator must be manifest," but deciding for apportionment of

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(a) Cas. temp. Talb. 204.

(d) 19 Ves. 517; 1 Mer. 193.

(b) 1 Cox 1; 1 Amb. 33.

(e) 1 Sim. 79.

(c) 1 Bro. C. C. 144; Dick.

(f) 13 Sim. 336, 349.

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(g) 1 Russ. &amp; M. 752.

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the burthens, in that case, upon the real and personal estates, according to their respective values, on the grounds that the testator directed a conversion of the real estate, and created out of the proceeds thereof and the personalty a mixed and general fund charged with debts and legacies. On the same ground proceeded the decisions in the subsequent cases of *Dunk v. Fenner* (a), *Foudrin v. Gowdey* (b), *Johnson v. Woods* (c), and the *Attorney General v. Southgate* (d).

Those decisions have not received general approbation (e), and the grounds on which they proceeded do not exist in this case. There is here no direction to sell or mortgage the real estates to form with the personalty a mixed fund; on the contrary, there are manifest traces of intention to preserve them in specie, so that the personalty is the first available fund, and it is sufficient. In *Robinson v. Taylor* (f), where the real estate was directed by the will to be sold, and the money to arise therefrom and the personal estate were given to trustees to discharge debts and legacies, Lord *Thurlow* held, that as the personal estate alone was sufficient, and the residue was undisposed of, there was a resulting trust, as to the real estate, for the heir-at-law. Had that case and *Digby v. Legard* (g) been cited before Sir *J. Leach*, in *Roberts v. Walker*, he would not have decided as he did in that case, which is inconsistent with the prior authorities.

Mr. *Turner* (with whom was Mr. *Wickens*) and Mr. *Anderdon*, for several of the representatives of the testator's next of kin, respondents in both appeals; but having conflicting interests with the heir-at-law and among themselves, supported the decree on both the disputed points.

(a) 2 Russ. & M. 557, 567. and 12 Law Jour., N. S., 147.

(b) 3 Myl. & K. 383.

(e) See 12 Sim. p. 82.

(c) 2 Beauv. 409.

(f) 1 Ves., jun., 44.

(d) 12 Sim. 77: see p. 83,

(g) 3 P. Wms. 22 n.

As to the first appeal, the terms of the codicil, reciting that the testator had by his will directed his trustees "to divide his real and personal estate in the event therein mentioned into as many equal shares as there should be sons of his two nephews then living," &c., left no room to doubt that the trusts so referred to comprised all sons of the nephews, whether born before or after the testator's death; *Hughes v. Hughes* (a). As it was possible that the first son who should attain the age of twenty-five years, the event on which the division of the property was to be made, might be an after-born son, the limitations were too remote, and therefore void. There was no previous estate given, and no gift at all to the grand-nephews, except in the direction to the trustees to divide and convey the shares among such of them, including those born after the testator's death, as should be living at the period named, so that there could be no vesting of interest before that period, notwithstanding the provision for maintenance and education; *Batsford v. Kebbell* (b), *Watson v. Hayes* (c).

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As to the second appeal, the question is, whether, upon the construction of the will, it can be ascertained to have been the testator's intention to create, from the real and personal property, a common fund for payment of his legacies and annuities, which he charged upon both estates. He by one and the same clause gave his trustees his real and personal estate, subject to the annuities and legacies; he treated the rents, interest, and produce arising from the trust estate, as a mixed and common fund, out of which he, by various successive provisions, directed the annuities and legacies to be paid, except the charity legacies, which he directed to be paid out of the personal estate, thereby manifesting an intention that, with that exception, both estates should be

(a) 3 Bro. C. C. 252, 454;      (b) 3 Ves., jun., 363.  
 and 14 Ves. 256.                      (c) 5 Myl. & Cr. 125.



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charged with them, without any direction, express or implied, to make one part of the common fund applicable before the other, and there being no gift of the legacies and annuities, distinct from the declaration, affixing the trust on the general body of the property. The necessary presumption therefore is, that he intended the two estates to be applied in payment of them, *pari passu*, and in proportions to be determined by their respective values; *Bootle v. Blundell* (a); *Young v. Hassard* (b); *Roberts v. Walker* (c); *Attorney General v. Southgate* (d); *Christian v. Foster* (e); *Sturge v. Dimsdale* (f).

Mr. *J. Parker*, for the heir-at-law, in reply to the arguments for the representatives of the next of kin of the testator, said they all agreed that he died intestate as to so much of the real and personal estate as was comprised in the trusts for the grand-nephews (which failed for remoteness), but they differed as to the application of the real estate to the payment of the legacies and annuities until the personal estate should be exhausted. The difficulty was caused by Sir *J. Leach's* decision in *Roberts v. Walker*, and other cases which followed it, including the *Attorney General v. Southgate*. These cases are supposed to have broken in upon the rule, which had always governed the administration of assets in courts of equity—first applying the personal estate in payment of debts and legacies, and resorting to the real estate only in case of deficiency of the personalty.

Mr. *Bethell*, in reply for the appellants in the first appeal, referred to the state of the families of the testator and of his nephews at the date of the will. He would not rely solely on the clause for maintenance and education of the nephews' sons in favor of the vesting of their shares of

(a) 19 Ves. 494, 517.

(b) 1 Dru. & W. 638.

(c) 1 Russ. & M. 752.

(d) 12 L. Jour., N. S., 147.

(e) 2 Phillips, 161.

(f) 6 Beav. 462.

the trust estate, however acceptable to his clients such a decision would be ; but he contended that as those sons only who were born in the testator's lifetime were included in that clause, no other sons were comprehended in the direction for the division of the trust estate among " the sons " of the two nephews then living. These words must have reference to the same sons that were referred to in the preceding clause, and were equivalent to " the said " or " such sons ; " *Wild's Case* (g) ; *Ellicombe v. Gompertz* (h). That is the rational construction of the two clauses, and is well illustrated by the rules of construction and cases stated in Mr. *Jarman's* Treatise on Wills (i) ; *Butler v. Lowe* (j) ; and not varied or affected by the cases cited on the other side, of *Morse v. Lord Ormonde* (k) ; *Tidcomb v. Butler* (l) ; *Eyre v. Mursden* (m). The nature and effect of these cases are stated most clearly in the same Treatise of Mr. *Jarman*, and the conclusion which they, and especially *Ellicombe v. Gompertz*, support, is, that the words " any son " and " the sons then living of my said nephews," mean the sons before referred to in the clause providing annuities for maintenance and education. In *Langston v. Langston* (n), this House applied the universal rule of giving effect to a deed or other instrument, and, with that view, supplied by implication, from the whole context of a will, a devise to the first son, who was not at all mentioned in it. The expressions, attributed to Lord *Kenyon* in the case of *Jee v. Lord Aulley* (o), must be taken to apply to the facts of that case, and do not support the argument for the respondent in this. Here the sons of the nephews are provided

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(g) 6 Co. Rep. 16.

(l) 3 Sim. 417.

(h) 3 Myl. & Cr. 127.

(m) 2 Keen, 564.

(i) Vol. 2, p. 74, &c.

(n) 3 Clark & Fin. 194,

(j) 10 Sim. 317.

see p. 317.

(k) 5 Madd. 99 ; and 1 Russ.

(o) 1 Cox, 325.

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with maintenance until they attain the age of twenty-five ; until then the trustees were to invest the surplus rents and profits of both estates for accumulation upon trust, " when and so soon as any son " attain that age, there was to be a valuation and division. All that was required to preserve this clause and the whole will from being destroyed, was to read " any son," as " any such son," or " any of the said sons," before spoken of, which would be equivalent to any son living at the testator's death. The numerous cases, from *Wild's Case* down to *Tidcomb v. Butler*, and *Ellicombe v. Gompertz*, shew how readily the courts adopt liberal interpretations of instruments for the purpose of giving full effect to them. If the House agree in the decision of the Vice Chancellor, that the gifts of the annuities for maintenance of the sons, until they attain twenty-five, are good—and there is no appeal from that decision—the same construction ought to be put on the gifts of the accumulations of the surplus rents and interest. If a strict adherence to the words of the clause would defeat it, then the House ought not to adhere to them, but give them a liberal interpretation according to the established canons of construction (p).

Feb. 28.     *The Lord Chancellor.*—Two questions are raised by these appeals : first, whether the gift of the trust property in favor of the sons of the testator's nephews be void as too remote, as declared by the decree ; and, secondly, whether the decree be correct in declaring that the testator's real and copyhold estates are subject to the payment of his debts, legacies, and annuities, equally with and in the same degree as his personal estate.

1st Appeal.     Upon the first point there is no doubt as to the rule of law ; the question, if any, is as to the application of the

rule to the facts of this case. If the gift to the sons of the nephews include sons who might be born after the testator's death, then the gift to them is too remote. The rule is so clearly expounded by Sir *William Grant* in *Leake v. Robinson* (q), that it is sufficient to refer to that case. The only question, therefore, is as to the construction of the will. The gift to the sons of the testator's nephews is in the direction that the trustees shall hold the surplus of the trust property upon trust, "when and so soon as that any son of either of his nephews, *John* and *Joseph Boughton*, shall have attained the age of twenty-five years, a valuation should be made, and that the same should be divided into as many equal lots or shares as there should be sons of his two nephews then living ; and that each of his nephews' sons, as they should respectively arrive at the age of twenty-five years, should choose one of such shares ;" which was to be conveyed and transferred as directed by the will.

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There cannot, I think, be any doubt as to the construction of this gift. The parties to take are sons of the two nephews, who should be living when the first of them should attain twenty-five ; but such son, who should first attain twenty-five, might not be born until after the testator's death ; and the case would therefore fall directly within the rule as expounded by Sir *W. Grant* in *Leake v. Robinson*.

But it was argued that this obvious construction of the gift is controlled by other parts of the will, and that upon the true construction of the whole together the shares were given to sons living at the testator's death, and vested in them before twenty-five, though the payment or enjoyment was intended to be postponed till that age.

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It cannot be said that any words can be so strong in a will as to preclude the qualification of them by other parts of it ; but it would be very hazardous to permit terms, perfectly unambiguous in themselves, to be so qualified by anything short of a very clear exposition of the testator's meaning.

It was first said that the gift of annuities for the maintenance of the sons of the nephews was evidence of an intention to vest those shares. These annuities are given without reference to the amount of the shares ; and in *Leake v. Robinson* Sir *W. Grant* says, that although the gift of the whole interest had always been held to furnish a strong presumption of an intention to vest the capital, such a presumption was not afforded by a direction for maintenance out of the interest. There is nothing in the gift over to the heir to affect the obvious meaning of the terms of the gift ; for the testator is obviously and in terms speaking of the sons to whom he had before given the property, and the attempt to introduce the words " such " or " the said " into the description of the parties to take the surplus, upon the authority of *Ellicombe v. Gompertz* (r), is, I think, hopeless. In that case the event upon which the gift over was to take effect, was clearly within the legal period ; but the time at which it was, according to the terms used, to come into operation might be too remote ; and to reconcile these inconsistencies, I thought that the word " such " or " the said " might be understood. In this case there is no such inconsistency. I am therefore of opinion that there is nothing in the other parts of the will to affect the obvious meaning of the words used in the gift, and that the direction is to divide the property amongst such of the sons of the two nephews as may be living, when the first of such sons shall attain twenty-

five ; and that such gift is too remote and therefore void; and that therefore the decree in that respect is correct.

The next question is, whether the decree is right in declaring that the real estate ought to be applied in payment of the legacies and annuities, *pari passu* with the personal estate ; that is, whether it ought, *pro tanto*, to be applied in exoneration of the personal estate, the primary fund for such payment.

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Upon this subject the earlier cases are very numerous and very contradictory. It is, therefore, satisfactory to be relieved from the necessity of investigating them by looking for the rule, as properly extracted from these earlier authorities, and as correctly laid down by Lord *Eldon* in *Bootle v. Blundell* (s). Lord *Eldon* there lays down the rule in these words :—" It is clear that it is not enough that the real estate is charged with, or devoted in any form to, the payment of the debts ; but the construction must be one that aims at finding, not that the real estate is charged, but that the personal estate is discharged : " which in substance comes to this, that the *onus probandi* lies upon those who contend that the real estate is to be applied in exoneration of the personal estate, the rule of law prevailing unless a contrary course be directed by the will.

In this case the testator devises and bequeaths all his real and personal estate to the same persons whom he afterwards appoints executors ; and, there being no direction to sell, he directs his trustees to hold such real and personal estate upon the trust, and for the ends, intents, and purposes, and subject to the several annuities and charges thereafter given ; that is to say, upon trust to receive the rents, interest and profits thereof, and thereout to retain 10*l.* *per annum* for their trouble, and upon

(s) 19 Ves. 518.

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further trust to pay certain legacies and certain annuities and to invest all and singular the surplus of the rents issues, and profits of his said trust estate and premises, in any, after payment of the several annuities, legacies, and charges before expressed, and to stand possessed of the trust estate, and the accumulations thereof, for the sons of his nephews, and by good and effective conveyance and assurance in the law, to convey and assure for each of them such share as they should become entitled to. And he provided that, in the apportionment and division of his trust estates, the eldest son of his nephew *John* should have the option of choosing a particular estate to be conveyed for him, and, if the value should exceed his share, that the difference should be charged upon the same for the benefit of the others. And there was a similar provision for the eldest son of his nephew *Joseph*, with respect to another estate.

By a codicil he recites that he had, by his will, after bequeathing certain legacies and annuities, directed his trustees to divide his real and personal estate, so that each of the sons of his nephews should for his life have the rents issues, or profits of one lot or share of his said real and personal estate.

There is no charge of debts upon the real estate. The question, therefore, applies only to legacies and annuities. It was argued that the testator must have intended that the 10% to the trustees, who were also executors, should be paid out of the joint income, because the trouble was incident to both descriptions of property. That is only conjecture as to the motive, which, according to the rule laid down in *Boottle v. Blundell*, is inadmissible in the consideration of this subject. It was then contended that the direction for payment of the charity legacies out of the personal estate was indicative of the intention that all other legacies should be payable in part out of the real

estate. It is only indicative of a proper precaution that no part of such legacies should fail in the event of the contemplated necessity of calling in the real in aid of the personal estate. It is a provision therefore inapplicable to either construction, and inoperative for the purpose.

The result, therefore, is, that this is simply a case in which both the real and personal estates are vested in the same persons, who are directed to pay certain annuities, and to invest certain legacies, and to divide the surplus of the whole, without any direction to sell any part of the real estate. I cannot find in this disposition, or in any expression in the will, any direction or evidence of intention that the ordinary rule of administration should be departed from and the real estate applied in payment of the legacies and annuities, *pari passu* with the personalty. It is indeed incredible that he should have entertained any such intention. His intention was that the surplus of the whole property, real and personal, should go to the same persons. It is clear that he did not contemplate the sale of his real estate; but, on the contrary, the appropriating particular estates to the eldest sons of his nephews, proves that he contemplated their continuing in their integrity; and it appears that he intended, in any event, to charge the rents and income of his estates. Could he therefore have intended, there being a fund of the personalty, that the rents of his lands should be applied in preference to the unemployed personalty, both funds being destined for the same persons? The judgment of the Vice Chancellor (*a*) seems to have proceeded upon the ground that the testator had intended that the whole of his property should form one mass for the purpose of paying rateably the annuities and legacies; but I do not find anything in the will indicating such an intention, except the vesting of both descriptions of pro-

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(a) 1 Collyer, 36.



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perty in the same persons, and directing them to pay the legacies and annuities, without saying how or out of what part of the funds in their hands such payment should be made.

I cannot infer from the vesting of both funds in the same persons, any intention that they should apply them otherwise than according to the course of law; and indeed, as is observed by Lord *Eldon* in *Boottle v. Blundell*, that circumstance has been much relied upon as negating an intention to exonerate the personal estate.

The Vice Chancellor does not refer to the case of *Roberts v. Walker (a)*, and others which followed it, but they were relied upon in the argument; and the expression of "making one mass" seems to imply that his judgment was influenced by those cases. Those decisions, whether right or wrong, are not at present under consideration; for the ground upon which they all proceeded, and which was new, does not exist in the present case. In all those cases there was a direction to sell the real estate, and to make the payments out of the mixed fund so created, and the Master of the Rolls founded his judgment upon that fact in *Roberts v. Walker*.

The same occurred in *Dunk v. Fenner (b)*, although the disposition was more complicated. *Fourdrin v. Gowdey (c)* was the same, and so was *Johnson v. Woods (d)*. In those cases the testators made one mass of property, by directing the sale of the realty and the application of the proceeds, together with the personalty. In the present case no alteration is made in the character of the funds; each part retains its original character, and, as I conceive, its original liabilities, in the absence of any direction to the contrary. The land, so far as the will has charged it, is

(a) 1 Russ. & Myl. 752.

(b) 2 Russ. & Myl. 557.

(c) 3 Myl. & K. 383.

(d) 2 Beav. 409.

made chargeable with the legacies and annuities ; but it has never been held that a mere charge of legacies upon the real estate is a discharge of the personalty. The question is, as Lord *Eldon* puts it in *Boottle v. Blundell*, not whether the real estate is charged, but whether the personal estate is discharged. The present case does not, in my opinion, fall within the principle of those decisions ; leaving them therefore untouched by any observations I have made, or by the course I shall advise your Lordships to adopt, and looking to the rule as it existed before those decisions, and as expounded by Lord *Eldon* in *Boottle v. Blundell*, I am of opinion that there is nothing in this will to exonerate the personal estate from its ordinary legal liability to pay the legacies and annuities given by the will ; and I advise your Lordships therefore to make the necessary alteration in the decree to effect that purpose.

*Ordered*, that the first appeal be dismissed, and that so much of the decree of *February* 1848 as was therein complained of be affirmed ; and that the appellants pay to the respondents who appeared to the appeal the costs incurred by them.

And, as to the second appeal, it was *declared* and adjudged that the legacies and annuities given by the will, and not expressly directed to be paid out of the personal estate, are primarily chargeable on and payable out of such estate, and that the decree be in that respect varied by omitting all such parts thereof as are inconsistent with this declaration, or which exempt such personal estate from the ordinary legal liability of personal estate to pay such legacies and annuities ; and also by omitting all such directions to the Master as are inconsistent with this declaration ; and that, subject to such variations, the said decree be affirmed ; and that the costs of the applicant *W. Boughton*, and of certain of the respondents, be paid out of the fund in the Court of Chancery ; And that with these variations, the cause be remitted to the Court below. (See the Lords' Journals for 28th of *February* 1848).

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 March 7, 9,      of LONDON - - - - -  
 13.      HER MAJESTY'S ATTORNEY GENERAL - *Respondent.*

*Information.*  
*Jurisdiction.*  
*Pleading.*  
*Costs.*

THE *Attorney General* (after the passing of the statute 5 Vict., c. 5), filed an information in Chancery against the Mayor and Commonalty of *London*, alleging that the Crown was seised of the bed and soil of the river *Thames*; that the defendants were conservators thereof, and in breach of their duty as such conservators, had granted to divers persons (also made defendants) licences to embank parts of the river, and had received fines for such licences, and that such embankments were nuisances; and the information prayed that the rights of the parties might be ascertained, that the licences might be declared void, and that injunctions might issue to prevent the completion of the embankments. The defendants denied that the embankments were nuisances, and demurred to the rest of the bill for want of equity:

Held, affirming an order of the Master of the Rolls, that, upon these pleadings, the information was maintainable.

If a bill or information discloses, upon the facts stated in any part of it, ground for a decree in equity, it is maintainable. *Per the Lord Chancellor*, pp. 464—6—7.

A bill, which raises a legal question, may be so framed as not to be open to demurrer on that account, but, on the real nature of the question appearing at the hearing, the court of equity will refuse to interfere. *Per the Lord Chancellor*, p. 468.

As the Crown would not be liable to costs in this case, the judgment of the Court below was affirmed without costs.

*Quare*: Whether, when an act of Parliament transfers jurisdiction from one Court to another, or grants an extension of the jurisdiction of an existing Court, it is necessary, in order to make the act binding on the Crown, that the Crown should be named therein?

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ON the 15th day of *February*, 1844, Sir *Frederick Pollock*, as Attorney General, filed an information in the Court

of Chancery, which information was afterwards amended and stated as follows :—

That by the royal prerogative, the ground and soil of the coast and shores of the sea round this kingdom, and of every port, haven, and arm of the sea, creek, pool, and navigable river thereof into which the sea ebbs and flows, and also the shore lying between high water mark and low water mark, at ordinary tides, belonged to her Majesty, who had also a right of empire or government over the navigable rivers of this kingdom ; and that her Majesty was seised, in right of the Crown of *England*, of and in the port and haven of *London*, and of the river *Thames*, the same being an arm of the sea, into which the sea always flowed and reflowed ; and that the said river was and had been an ancient royal and navigable river and king's highway for all persons, with their ships, vessels, boats, and crafts to pass, repass, and navigate at their free will and pleasure, and to moor their vessels in convenient parts of the river, not impeding the navigation thereof : that the Mayor or the Corporation of the City of *London* had for a very long period, either by prescription or under some grant from the Crown, held and exercised the office of bailiff or conservator of the river *Thames*, the said office being exercised by the Mayor for the time being or his sufficient deputies, from time to time for ever, in, upon, or about the *Thames*, from a short distance above the bridge of *Staines* to the bridge of *London*, and thence to a certain place called *Yantleet*, towards the sea and in the port of *London* ; and that the duty of the said mayor, bailiff, or conservator, was to see to the navigation of the river *Thames*, and to prevent the erection of obstructions and nuisances in the said river, and also to regulate the fishing thereof ; but the said Mayor did not, in virtue of such office, take or acquire any estate or interest in the ground and soil of the bed or shores between high and low water mark of the said river.

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The information then alleged that the Mayor, Commonalty, and Citizens of the City of *London*, had of late claimed to be seized or entitled of or to the freehold of the ground, bed, and soil of the said river, and of the shores thereof between high and low water mark, within the same limits in which the Mayor exercised the office of bailiff or conservator, and had assumed to exercise such acts of ownership over the soil and shores of the river as were beyond the power and authority of the bailiff and conservator ; and that in particular the said Mayor, Commonalty, and Citizens, had lately taken upon themselves to make grants to parties possessed of wharves or land on the banks of the river, or to such other persons as they thought fit, to licence them to embank the strand and soil of the said river, and build thereon between high and low water mark.

That in particular the said Mayor, Commonalty, and Citizens had granted such licence or authority to embank to *William Cubitt*, one of the defendants thereafter named, by an indenture made the third day of *May*, in the year of our Lord 1843, between the Mayor and Commonalty and Citizens of the City of *London*, of the one part, and *William Cubitt*, of *Gray's Inn Road*, in the county of *Middlesex*, builder, of the other part, by which, in consideration of the sum of two pounds to the Mayor, Commonalty, and Citizens, paid by *Cubitt*, they granted unto *Cubitt*, for the benefit of himself and all other the persons (if any) who then were and who might for the time being be entitled to or interested in the wharf and premises thereafter described as adjoining the river *Thames*, and in the occupation of *Cubitt*, full and free permission, licence, and authority to embank so much of the strand or soil of the said river as lay between the high and low water mark thereof, situate, &c., on the north side of the river, opposite the *Isle of Dogs* ; And it was provided that this licence was granted upon the express condition that the embankment should be completed within the

space of eighteen calendar months from the date thereof, under the superintendence and to the satisfaction of the said Mayor, Commonalty, and Citizens, or of an officer to be appointed by them for that purpose; and that the front or river wall, and the side walls of the said embankment, should at all times be kept in good and substantial repair.

The information, after stating covenants by *Cubitt* in accordance with these provisions, and that he was preparing to execute the embankment according to the terms of the indenture, further stated that the said Mayor and Citizens had also granted to other persons therein named a licence to embank part of the shore of the river *Thames*, between high and low water mark, in front of a wharf called *Durrant's* wharf, in the parish of *Rotherhithe*, in the county of *Surrey*. It then set out the licence, and alleged that the parties to whom this licence had been granted had already begun to erect the embankment upon the soil of the river, between high and low water mark, and were proceeding to complete the embankment, in order to make use of the land so taken from the shore or bed of the river as a wharf; that this embankment would be detrimental to the river *Thames*, and a nuisance and injury to her Majesty's subjects navigating the same, inasmuch as it would not only narrow the water-way, but would also produce an eddy at each end of such embankment, and an increased deposit of mud in the parts adjacent, and would produce shoals in some parts of the river below the embankment, by excluding a quantity of tidal water essential to the scour or preservation of the depth of the said river.

The information set forth other grants (in consideration of fines) made by the Mayor and Corporation, particularly to one *J. Park*, at *Battersea*, and repeated the allegations of injury to the bed of the river and to its navigation by the making of the embankments in pursuance of such grants. It traversed the right of the grantees to make such

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embankments, and denied that any charter granted by the Crown had given the Mayor and Citizens any title to the soil or bed of the river, or had recognised any immemorial right as vested in them. It then specially referred to a charter of the 23 Hen. VI., and denied that it gave to, or recognised such a right as existing in, the Mayor and Citizens, and alleged that no evidence of the exercise of any such right was sufficient to establish such right by immemorial usage. The information traversed the right of the Mayor and Citizens to make or to authorize the making of any embankments on the river, and charged that it was the duty of the Mayor to prevent the same, that even if the bed and soil of the river were vested in the Mayor and Citizens, still the embankments at *Battersea* and *Rotherhithe* were common nuisances, and as such ought to be abated; and that the Mayor and Citizens, or their town clerk (the defendant *Merewether*) had documents in their possession relating to these matters, and ought to make discovery thereof. The information prayed that the rights of her Majesty and of the Mayor, &c., might be declared, that issues might be granted if necessary, that if the rights claimed by the Mayor and Citizens should be found to be null and void, an injunction might be granted, that the embankments already executed might be abated, that the Mayor, &c., might be ordered to be accountable, and that the right of the Crown to the bed and soil of the river might be for ever established.

The Mayor, and Citizens, and the other persons, defendants in the information, appeared, and to all the parts of the information, except those which charged that the embankments were nuisances, and were injurious to the bed and soil of the river, and to the navigation thereof, demurred, for want of equity; and as to these excepted parts, they answered, denying that the embankments had occasioned, or would occasion, any injury to the river, or to its naviga-

tion; and they said, that in the case of the *Rotherhithe* embankment, the plan had been laid down by Mr. *Walker*, the civil engineer (who was perfectly acquainted with the river), together with the harbour masters and Captain *Bullock*, hydrographer to the Admiralty, and that such embankment had there improved the navigation of the river, by enlarging the tidal scour thereof. The defendants then denied that the embankment at *Battersea* would be injurious; they denied that either of the embankments was a nuisance; and denied that the mayor and citizens then claimed, or ever had claimed, to create a nuisance to or upon the said navigable river, or to the injury of the Queen's subjects navigating the same.

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The case was argued before the Master of the Rolls, who, by an order of the 4th *June*, 1845, overruled the demurrer (*a*). The appeal was against this order.

Mr. *Bethell* and Mr. Serjeant *Channell* (Mr. *Randell* and Mr. *James Wilde* were with them), for the appellants:

The Master of the Rolls laid down the broad proposition, that all the jurisdiction in these matters was, by the 5 *Vict.*, c. 5, transferred to the Court of Chancery. Such a proposition cannot be supported. Since this decision has taken place, two cases have occurred in the Exchequer, in which that Court has held that it still retains its equitable jurisdiction in matters of revenue (*b*). In the latter of those cases the question of jurisdiction was directly in issue, and the judgment, which was very elaborately considered, is therefore of very high authority. If they are right, the judgment of the Master of the Rolls in this case cannot be sustained. Those decisions and the present are inconsistent with

(*a*) 8 *Beav.* 270; 14 *Law Mee. & W.* 97; and the *Attorney General v. Hulling*, 16 *Jour.*, Ch. 305.

(*b*) The cases referred to are *Law J. (Ex.)* 304, and 15 *Mee. & W.* 687.  
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each other. It is submitted that they are right, and that the Master of the Rolls was wrong, and consequently that his order in this case must be reversed. That is the first objection. The next is as to the form of the information, which could not be maintained in any court of equity whatever.

The shores of the river appear to have been granted to the Corporation, yet the Attorney General says that that grant is without any effect. Usage is, however, in favor of the Corporation, but usage is treated as of no value; and it is charged that the ground and soil of the river are in the Crown, and that the Corporation has no power to permit building of any sort on the shores of the river, but that if there are embankments in any way obstructing the navigation of the river, it is the duty of the Corporation to prevent them. And this restriction as to the powers of the Corporation is extended to the soil between the high and low water marks.

Such being alleged to be the extent of the legal rights of the Corporation, the information then proceeds to charge that all the embankments authorized by the Corporation are in fact nuisances, for that they do obstruct the navigation and deprive the Queen's subjects of their rights thereon. But it is plain that nothing of that sort can affect the question of right to the soil, for if the embankments actually made, or in progress, are in fact nuisances (which is however positively denied), still the right to authorise embankments, which are not nuisances, cannot be thereby affected. The Attorney General may have a good right to come and demand that nuisances should be removed, but a judgment in his favor, on that point, will not determine the question as to the title to the soil or bed of the river, nor shew that the Corporation cannot grant to any one whatever a license to embank any part of the river. The case here set up on the part of the Crown is not that of a *purpresture*, but of a nuisance. There is a great distinction

between *purprestures*, which are private encroachments on the property of the Crown, and nuisances, which are matters of public concern. The former may be proceeded against in equity, the latter must be proceeded against at law. The charge here is of a nuisance, and not of a *purpresture*, and the demurrer is therefore a general demurrer, on the ground that this is not a case in which the Crown can ask a court of equity for a discovery and general relief.

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The real question in this case is, whether the point in dispute between the Crown and the Corporation shall be determined in a legal and constitutional manner, or by what is in effect an inquisitorial process. This question depends upon the construction to be given to the statute 5 Vic., c. 5. To decide what is the proper construction of that statute, it is necessary to consider what the Court of Exchequer was before the passing of that act. The Exchequer was a court of revenue, and, as such, exercised a jurisdiction in equity as well as at law; the *Attorney General v. Halling (d)*. It cannot be denied that this court of revenue is a court of equity for the purposes of the revenue. By the 5 Vict., c. 5, the equity jurisdiction of the Court of Exchequer, as between subject and subject, was transferred to the Court of Chancery; but its jurisdiction as a court of revenue, and a court of equity incident to revenue, is not transferred. So far as the Crown is concerned, the powers of the Court of Exchequer are untouched by the statute. They would still be untouched to that extent, even if they were in all other respects taken away; for the statute does not name the Crown; and it is a universal rule of construction, that the Crown is not bound nor affected by the provisions of an act of Parliament, unless named therein. The two cases above cited (in

(c) 15 Mee. & W. 694. By Lord Chief Baron *Pollock*, in judgment.

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the latter of which especially it is to be regretted that the arguments are not given), shew, that for the purposes of the public service, it is desirable that the law officers of the Crown should preserve these rights of the Crown in the Court of Exchequer.

[The *Lord Chancellor*.—The statute effects a transfer of the jurisdiction from one court to another, or the extension of the jurisdiction of one court. In such a case the argument as to the naming of the Crown in an act of Parliament does not seem to apply].

The first clause of the statute manifests the intention of the legislature to exempt some part of the revenue jurisdiction of the Crown from being affected by its provisions. The Barons of the Exchequer agree in saying that this exempted jurisdiction does not comprehend the ordinary equity jurisdiction between subject and subject, which is equivalent to saying that the other part of the equity jurisdiction is untouched by the statute. What are the exemptions in the statute? The first is of all the powers possessed by the Court, such as are exercised by the courts of law; the second is of all such as are exercised by it as a court of revenue, and not heretofore exercised by it as a court of equity. The equity jurisdiction in matters where the Crown is concerned, is within the second exception; for that jurisdiction was one of a peculiar nature, specially appropriated to itself, and did not belong to it in its ordinary capacity as a court of equity. Though some of the officers of the Court are taken away, the peculiar officers who belong to it as a court of revenue remain.

This case raises this important constitutional question, whether it is competent to the Crown to bring into a court of equity a case for adjudication, which is a pure case of legal title, and to have that case argued on and adjudged, with this peculiar advantage ensured to the Crown, that it shall have the power to compel discovery and a disclosure of the title on the part of the defendants

who are sued. The course now taken is also subject to this objection, that it deprives the private party of the benefit intended by the 21 Jac. I., c. 14, to be conferred on all the subjects of the realm, namely, to plead the general issue, and thus throw on the party claiming the right of possession the necessity of recovering by the strength of his own title.

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[The *Lord Chancellor*.—The consequence here would have been the same had this been an information in the Equity Exchequer].

But it is contended on that very ground that an information there would not have been a proper mode of proceeding.

[The *Lord Chancellor*.—I do not understand what the Lord Chief Baron means, when he says (*d*), “The first exception is of all powers possessed by or incident to it as a court of common law. It has all the powers, legal and equitable, which, by statute or common law, belong to the other courts of common law.” What are the equitable powers belonging to the courts of common law ?]

Perhaps they are the powers under the statutes of interpleader. The subject is very involved, but the probable meaning of the Lord Chief Baron is, that there are two kinds of equitable jurisdiction attributable to the Court of Exchequer: its original equitable jurisdiction, as between the Crown and the subject, and its usurped equitable jurisdiction, as between subject and subject. The statute intended to transfer to the Court of Chancery the usurped jurisdiction.

[The *Lord Chancellor*.—Can you distinguish between them ?]

No, for the jurisdiction is in all cases said to be exercised *jure coronæ*, in virtue of a party being a debtor to the Crown.

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It is a recognized principle, that where legal rights are involved, a party has no occasion to go into a court of equity, if the courts of common law can give him full relief. *The Attorney General v. St. Aubyn (a)*, where Mr. Baron Wood says, that "if the Crown can come here, and by filing a bill, compel a person to disclose his title, there will be an end to the Statute of *James*, and the subject will be deprived of his trial by jury.

[Lord Campbell.—Do you mean to say that this information could not have been filed in Chancery before the statute?]

Certainly—For it does not contain any matter of Equity.

[The Lord Chancellor.—But do these questions of jurisdiction properly arise here? There is not, on the face of these proceedings, any adverse claim of the soil. The information states that the present appellants are conservators of the river under the Crown, but that they have no right to the soil thereof. That is admitted on the face of the pleadings, and the appellants are charged with having created a nuisance, by their violation of their powers and duties as conservators of the river.]

The information itself raises the question of title, for it expressly negatives that any charters or letters patent, granted by the Crown, "contain any grant of the soil, or bed of the river Thames, or of the shores thereof, between high and low water mark, to the mayor, commonalty and citizens of London." And then this question being thus raised in the information, the demurrer is addressed to the jurisdiction; because, admitting that to be a question raised, the demurrer alleges that the Court of Chancery is not the proper Court to try it. As to the question of nuisance, the appellants are not the parties to try that—

(e) 1 Wightw. 180. See also *Walsingham v. the Attorney General*, Hard. 49—51.

[The *Lord Chancellor*.—Yes, they are ; for the embankments alleged to be nuisances, are alleged to have been made under your license.]

That is not quite so. The appellants have granted licenses to embank ; but it is not alleged that the embankments are made as authorised in the licenses, and a license to embank may be rightly granted, and yet the mode adopted for effecting the embankment may be a nuisance.

[The *Lord Chancellor*.—There is a part of the information which alleges that the appellants have of late assumed to exercise acts of ownership over the soil and shores of the river, such as are beyond the powers of bailiffs and conservators. That part is not demurred to. The Crown puts the matter in the alternative, and claims to be the owner of the soil ; but also alleges that, if not owner, still the appellants are but bailiffs, and that they have exceeded their powers as such. This resembles a bill, where it is charged that a man cuts down timber, he not being the owner of the field, but merely tenant for life. No demurrer would lie to such a bill.]

It would not ; but the allegation that the mayor and commonalty have taken on themselves to grant licenses, does not say that they have done so as conservators, and therefore it must be taken that they have done so as owners. The question of title to the freehold, is, therefore, directly raised. Suppose a bill by a remainder-man, alleging that the tenant for life sets up a right as tenant in fee, and that he has granted leases as such, and praying the Court of Chancery to determine to whom the fee belongs ; it is clear that no such bill could be sustained.—

[The *Lord Chancellor*.—But that is not the form adopted here.]

Yet all the prayer for the interposition of the Court is founded upon such a hypothesis. The purpose of the prayer of a bill is to explain and amend what might be ambiguous in the bill itself ; and here, after an allegation in the information that the Crown has the right and title

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to the bed and soil of the river, and that the mayor and commonalty have set up a claim thereto, the prayer is, "that the right to the freehold and inheritance of and in the ground and soil of the bed of the river, and of the shores thereof between high and low water-mark, may be deemed and established to be in her Majesty, to the end that multiplicity of suits may be avoided, and that the validity of such grants from the mayor and commonalty may be determined." The court is here not asked to annul these grants, except after an examination of title. In the *Attorney General v. Johnson and Earl Grosvenor* (a); upon an information of this kind, Lord Eldon held, that it was quite immaterial to whom the soil of the river belonged, it not being competent, either to the Crown or a subject, to use it for any purposes amounting to a nuisance. But it is in explaining that doctrine that his Lordship's judgment becomes most material. He says (b), "I consider it to be quite immaterial whether the title to the soil between high and low water-mark is in the Crown, or in the city of *London*, or whether the city of *London* has the right of conservancy, operating as a check upon the improper use of the soil, the title being in the Crown, or whether Mr. *Johnson* or Earl *Grosvenor* has any derivative title by grant from any one having the power to grant." The case itself is not applicable as an authority here, for there the only prayer was for an injunction to abate the nuisance, and nothing was said as to declaring the right to the soil and bed of the river; but the observations in it are material.

[The *Lord Chancellor*.—This is the same as a bill by the remainder man, against the person whom the bill states to be only tenant for life, but who pretends to be the owner of the fee, and in such character to make deeds; and the bill prays that he may be declared not to be so, and that his deeds may be set aside. Can it be said, that if the whole statement of fact was admitted by

(a) 2 John Wils. Rep. 87.

(b) *Id.* 101.

a general demurrer for want of equity, the admission would not shew the fee to be as alleged in the bill?]

Whatever may be the allegations in a bill, if they are introduced for the purpose of calling on the Court to try and to determine a claim which the court has no jurisdiction to try or to determine, they will not maintain the bill.

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[The *Lord Chancellor*.—There is another view of the question. An information for a nuisance in a harbour may be maintained, though the soil is alleged to be in the Crown.]

There is no doubt of that: and if the Crown had thought fit to allege this to be a *purpresture*, this information might have been maintained; the *Attorney General v. Burbidge* (a). But that has not been done here. The title to the soil is the question raised.

But then it is said that this bill may be maintained, according to its prayer, to prevent multiplicity of suits. That is no ground for maintaining it. You cannot prevent an action of ejectment against each of one hundred tenants by filing a bill against one or other of them, asking for a determination of their rights in that suit. If you will take the whole of the information, and observe to what it is addressed, the issue it raises, the mode of trial it proposes, and the manner of making the subsequent relief depend on this subsequent enquiry, it is impossible to avoid seeing that the object of the information is the trial of the right of ownership over the soil and bed of the river. That question cannot be tried in a court of equity. The proper remedy here would have been by a proceeding as for an intrusion.

[Lord *Campbell*.—That is only where a party is in possession of that which the Crown claims.]

Intrusion is in the nature of an ejectment by the

(a) 10 Price, 350.



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Crown, and would bring this question of soil and freehold directly before the court. The information here raises no matter of equity, but purely a question of law.

[*Lord Campbell*.—Do you lay it down as a general rule, that where the Crown can proceed by information for an intrusion, it must do so, and cannot be allowed to proceed in any other way?]

Not quite so; but that where boundaries are in question, as they are here, the proceeding by way of intrusion is the proper remedy. And such is plainly the opinion of Mr. Baron *Wood*, in the *Attorney-General v. Sir John St. Aubyn*(a). If the subject-matter of the information is sufficient, according to ordinary rules, to found the jurisdiction of the Court of Chancery, then that court cannot want a transferred jurisdiction; but if that subject-matter is not of that kind, and such the Master of the Rolls seems to consider it, then the jurisdiction properly belongs to the Court of Exchequer, and has not been transferred to the Court of Chancery. But it is further submitted that the matter is one which relates entirely to legal title, and therefore cannot be made the subject of an equitable suit in any court.

The *Attorney General* and Mr. *Turner* (Mr. *Maule* was with them) for the respondent.

The question here resolves itself into one of form, and there can be no doubt that the demurrer is defective in form, and was properly overruled. In the first place, there is ample ground to assert the jurisdiction of a court of equity; but if not, then it may be contended that there has been under the statute a transfer of all the equitable jurisdiction of the Court of Exchequer to the Court of Chancery, and that an information of this description would have been perfectly well maintainable in the Exchequer or Equity prior to the passing of the statute.

(a) *Wightw.* 167.

What is the information here? It is one which charges an abuse of the powers confided to the mayor and commonalty, and complains that they have been guilty of that which is in substance a purpresture. All the allegations, with reference to the proposed embankments at any of the places mentioned in the information, set forth a case of breach of duty as bailiffs, as well as of injury to the public use of the river. Such being the state of the information, what is the demurrer? It is applied to every thing but those allegations which allege the injury to the public, and on them issue is joined. The defendants admit that there is an issue between them and the Attorney-General on the question of nuisance. They admit the possession of the documents which will prove the facts alleged, and they demur to the discovery of those documents. According to this representation of the pleadings, if the case was one between subject and subject, there can be no doubt that it might be made matter of inquiry in a court of equity. The House is not dealing here simply with the *jus publicum* of the Crown: it is a case of *jus privatum* of the Crown, and the Crown cannot in such a case be placed in a worse situation than a subject would be under similar circumstances. This demurrer, therefore, cannot be maintained, more especially in the face of an admission of the possession of the documents which are to be used on the trial of an issue, of nuisance or no nuisance, between the Crown and the grantees of the Crown.

[Lord Campbell.—The Corporation may be indicted for a nuisance, if one has been committed.]

Not here; for the Mayor and Commonalty are not alleged to be in possession, or to have committed the nuisance. Suppose that this case had taken the course of a motion in Chancery for an injunction, surely the production of the documents, which are admitted to be in the possession of the defendant, would be most material in such a

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motion ; and if material, the production of them would be ordered. So that in point of form this demurrer goes a great deal too far in resisting the production of them.

Then, is it not clear, that on the face of this information, there is an equitable case stated, entitling the Crown to a decree ? The general rule as to demurrer to a bill is this, that when the facts stated in the bill are admitted, the question is whether those facts do not establish a sufficient ground for interference ? Here the facts admitted show that the Crown is entitled to the bed of the river, and that the defendants held the office of conservators, and therefore were in a situation of confidence in relation to the Crown, being in fact the bailiffs of the Crown ; then that the mayor did not in virtue of his office take any interest in the soil of the river ; then that the mayor and commonalty had set up a claim not only to exercise the right of conservancy, but to be seised in fee of the ground, bed, and soil of the river ; and, finally, that they took on themselves to make grants which were not in accordance with their rights or duties of conservators. The prayer is, that the grantees shall be restrained, and that the deeds of grant shall be given up, they being contrary to the fiduciary duty of those who made them. Is not such a case one for the interference of a court of equity ? Can it be said that a landlord cannot come into a court of equity and call on his bailiff to account for the rents and profits of the estate entrusted to his management ? In this respect there is no distinction between the case of a private person and of a corporation as an agent of the Crown ; nor can there be any difference on the ground that the defendants here are bailiffs by office, instead of being bailiffs by appointment, for a bailiff by office shall account, *Comyn's Digest* (a). The declaration of right here prayed from the Crown, is for the purpose of preventing a multiplication of suits, and the

(a) Tit. Accompt (A 3) 2 ; citing 1 Rol. 116, l. 50.

Crown has a right, as much as any individual, to come into a court of equity and ask a declaration of right for such a purpose. The Crown cannot be put to the necessity of proceeding by writ of intrusion against these grantees, when, the day after doing so, the appellants may grant a hundred other licences of the same sort. It is true that here they do not actually perform the acts complained of; but they grant licences to others to do them, and therefore a declaration of right is necessary. Proceedings may be taken in this way by a principal against an agent; the *Mayor of York v. Pilkington* (b); that is an important case. A bill was there filed for a fishery; a demurrer was filed to the bill, on the ground that the bill was against several distinct parties, claiming different grounds of title. The court put the case that several defendants there claimed the same right, and after re-argument the demurrer was overruled. How does that case apply here? In this way, that all the licencees claim in a common right, and therefore this information, which is in the nature of a bill of peace, will lie. Then it is said that the mayor and commonalty did not do that which was here complained of, but that if done at all, it was done by those who had their lawful licence, but who neglected or violated that licence, and that this cannot make the act of granting the licence void. The answer is, that it is not necessary to file the information against those who actually do the act, nor perhaps could it be maintained against them without joining with them those under whose authority they acted. The mayor and commonalty here took fines for these licences, and therefore have a direct interest in the matter. The same equity is applicable here as in the cases of lords of manors, where questions arise as to reservations of privileges of particular mills, or as to rights of common, and where in a suit against the lord's grantee the lord himself must be joined.

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The only doubt is on the question whether the Crown

(b) 1 A.k. 282.

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was compellable to make the mayor and commonalty parties to the bill. On that point an important case was decided by Lord *Eldon* in 1819. That was a case of *Fairman v. King* (a), which related to the fishery at *Milton*. The bill was filed by the lessee of the *Milton* fishery against *King* and 130 other persons, calling themselves free fishermen, and the object was to prevent them entering on the fishery or disturbing the plaintiff's rights therein. An injunction was granted *ex parte*, and a motion afterwards made to dissolve it. Lord *Eldon*, in considering the question whether such an injunction could be granted, referred to the case of *Lord Tenham v. Herbert* (c), and adopted the opinion there expressed by the Lord Chancellor, that there were cases in which a man might by a bill of this kind first go into equity, and others where he must first establish his right at law. That was a strong case, and is directly applicable to the present. The lessee there claimed title to the fishery under a grant from the lord; his rights were disputed by 130 persons, claiming to be free fishermen, or dredgers in the river. If the lessee's title was good, he might have maintained trespass against every one of them, and his legal rights must have been proved in order to show that he had a title to any damages. Without having tried his legal right, but asserting in equity a purely legal title, he asked the assistance of the court against these 130 persons, who claimed a right as free fishermen. The objection was taken that this was a question of title, properly determinable in a court of law; but the Court, treating the suit as a bill of peace, said it was impossible to drive him to maintain actions of trespass against 130 persons, and therefore it interfered for the purpose of quieting the possession, and putting the legal rights in a course of legal trial between a small number of the parties interested. The same course must be followed here.

(a) MS.

(b) 2 Atk. 483.

Then it is said that ejectment might be maintained here ; but that is not so, for nothing that has occurred would enable the Crown to maintain ejectment against the corporation.

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[The *Lord Chancellor*.—Ejectment might not be maintained against the corporation, because it is not in possession ; but might not ejectment be maintained against its lessee or licensees ?]

Perhaps so ; but the corporation might grant a new lease immediately, and the suits might therefore be endless. To prevent such a course, the Crown may come into equity.(a) On this subject, that of permitting this information on the principle of a bill of peace, the case of *New Elme Hospital v. The Corporation of Andover*(b) is important ; for there the bill was allowed, after full consideration of all the difficulties which might be raised, and while proceedings were in fact going on at law. The rule as to such bills is well laid down in *Mitford* on Equity Pleading, where it is said(c), “ It is not necessary to establish the right at law before filing a bill, where the right appears on record, as under letters patent for a new invention ; in which case a demurrer to a bill for an injunction to restrain an infringement of the patent right has been overruled. . . . Where a right, *prima facie*, and of common right, is vested in the Crown, it will receive the same protection ; and this principle may be applied to some of the cases mentioned in a preceding page.” The cases of *Lord Tenham v. Herbert*, and the *Mayor of York v. Pilkington*, are among those referred to.

So that, if it was admitted that in the case of a private individual there must be a proceeding at law, it would not follow that the same course must be adopted in the case of the Crown. But the admission as to the private indi-

(a) Mitf. Trea. on Pleading,  
117, 3rd Edit.

(b) 1 Vern. 266.

(c) 3 edit. 119—4 edit. 145.

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vidual is not made ; and it is not necessary, therefore, to consider whether the Crown is or not exempted from a similar liability.

Then as to the prayer for an account. It is admitted that the corporation has received different sums of money in respect of these licenses. These sums have been received in consequence of a breach of duty. In a case of that kind, the rights of the Crown are well stated by Sir *Anthony Hart* in the *Attorney General v. The Corporation of Galway (a)*. It was insisted that the information which had been filed in that case could not be supported, because the matter in dispute was properly the subject of a legal demand ; but Sir *A. Hart* said (b), " It cannot be an objection to an information that there is a remedy at law. The Attorney General, acting on behalf of the public, has the right to sue in this court, even for a legal demand. . . . The Crown may call on the subject to come into any of the courts. Of course, I do not mean to say that trusts may be enforced in the King's Bench, or ejectments maintained in Chancery."

[The *Lord Chancellor*.—That is just the line where the distinction is drawn.]

It is so. The general principle of the Crown to sue in any of its courts is clear ; but that principle may be subject in its application to the necessity of proceeding in a particular manner.

[The *Lord Chancellor*.—Then would you say that the Crown might bring a case of law into a court of equity, but not a case of equity into a court of law.]

Certainly ; except in the instance of a proceeding under a statute.

[The *Lord Chancellor*.—No statute has much to do with this case. If the matter is matter of law, it is as objectionable in the Exchequer as in Chancery, unless

(a) 1 Molloy, 95.

(b) *Id.* 103.

you can show that there is a peculiar jurisdiction in the Exchequer which would make such a proceeding correct. If the *Attorney General* might have filed this information in the Court of Chancery before the statute of *Victoria*, then that statute has no application to the question now.]

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If the principles already submitted to the House are correct, then it is undoubted that an information of this nature could have been filed in the Exchequer antecedently to the statute, and by the statute all the equity jurisdiction of that court was transferred to Chancery. In the decisions of the Court of Exchequer, referred to on the other side, the judges must have confined their opinions to one clause of the statute.

[The *Lord Chancellor*.—If the Crown may still go to the Court of Exchequer as a court of equity, the statute requires amendment, for it has taken away all the machinery by which this sort of business was transacted in that court. There can be no doubt of the intention of the legislature to take away all jurisdiction from the Court of Exchequer in equity].

Such seems to be the reasonable construction of the statute. The right to adjudicate in such matters is entirely transferred to the Court of Chancery; and this is a matter of a purely equitable nature, for it charges a duty on the defendants as bailiffs, and a breach of duty by them in that character, and asks for the interference of the Court in respect of that charge. That is clearly within the jurisdiction of equity, and the order of the Court below must be sustained.

Mr. *Bethell*, in reply.

The simple inquiry here is, whether, *de facto*, the embankments are nuisances? That is not a subject for relief in equity. It is said that an indictment for a nuisance would not lie against the Corporation, because the Corpo-



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ration is not a party to the nuisance. But, if not, then the Corporation ought not to have been subjected to this proceeding, which relates entirely to nuisance; the *Attorney General v. Johnston (a)*.

The information elaborately sets forth a question of title in the Crown, and an alleged usurpation by the Corporation by acts of ownership, and asks that the title of the Crown may be declared. The information is therefore distinctly addressed to the question of freehold, which is a legal, and not an equitable question.

There are two classes of bills of peace: one may be maintained before trial, where the same interest exists in different persons; the other is where one title has been tried at law, and the bill is brought to prevent further and useless litigation. But the principle of a bill of peace does not apply to the Crown, for the Crown may include as many persons as it pleases in one information for intrusion. This case therefore does not fall within that class in which, in order to prevent endless litigation upon the same legal rights, equity permits bills to be filed in respect of such rights. The distinction is perfectly laid down by the case of *Aduir v. The New River Company (b)*. The case of *Fairman v. King and others (c)*, was an instance of a bill of peace after the legal title had been once tried. The case of *Newelme v. The Corporation of Andover (d)*, was not a proceeding of this sort at all, but was a bill to quiet possession, where there was no dispute as to what had before been the rights of the parties, for there had been a trial at law.

This is not a case of *purpresture*, for that is a wrongful inclosure of a part of the freehold of the Crown; but this is a complaint of a nuisance, and, as such, must be sent to a court of law. The case of *The Attorney General v. The*

(a) 2 John Wilson's Rep. 87.

(b) 11 Ves. 429.

(c) MS.

(d) 1 Vern. 266.

*Mayor of Galway*, is not in point here, for that related to the application of the borough funds, and was therefore in the nature of a public trust.

[*Lord Campbell*.—What are the allegations of this information? Referring to them, let me ask, whether, if a man is alleged to be the keeper of a royal forest, and is charged with cutting timber, or doing any other act of ownership, would not that be a breach of a fiduciary duty? and would not that entitle the Crown to maintain a suit in equity against him? Is it not the same thing here? If the Mayor of *London* is the conservator of the *Thames*, and he grants the soil of the river, is not that a breach of his fiduciary duty?]

Separate parts of the information may no doubt be selected, which will give an appearance of an equitable claim being raised by it; but, if the whole is properly taken together, it is clear that the question raised is one of title to freehold, and one therefore which gives good ground for demurrer to the jurisdiction. The facts stated in the information are not admitted, except so far as is necessary for the purpose of trying this question of jurisdiction. That question is fairly raised by this demurrer, and ought to be decided in favor of these appellants.

The *Lord Chancellor*.—My Lords, some important points have been raised in the arguments in this case, upon which, if it was at all necessary for your Lordships to express any opinion, I should, undoubtedly, think it right to desire time for more mature consideration; but so far from thinking it right to give an opinion upon points, which, though important, do not necessarily arise for decision, I think that it is my duty to abstain from such a course, because any opinion given under such circumstances can only have the effect of an *obiter* opinion expressed by an individual, and does not constitute the opinion of the whole House. The pleadings here are such as not to

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call for a decision upon the more important points raised in argument; and the more important the points raised are, the more I consider it the duty of the House to confine itself to that which is before it, and to decide on the minor points alone, if they alone are properly raised for its consideration.

This case comes before the House upon demurrer. The rules of a court of equity, and in fact also of a court of law, upon matters of demurrer, are generally free from all doubt; although particular cases may occur which may raise a difficulty about their application. The general principle is clear. The proposition raised by the demurrer amounts to this: admitting all your facts to be true, you do not state a case that any court of equity can give relief upon. If there is any part of the case which would entitle the parties to a decree upon the facts stated, the demurrer cannot be supported. A demurrer to a bill or information, therefore, challenges the plaintiff to show that he is entitled to some portion of the relief prayed according to the facts stated.

This bill, which is filed by the *Attorney General*, asserts in terms the right of the Crown to the soil of the river *Thames*, between high and low water-marks. It alleges, indeed, that the defendants set up a claim to the freehold of that soil; but it alleges and charges that they have no such right, that the right is in the Crown; that the corporators of *London*, exercising their duty through the means of the Lord Mayor, are merely conservators or bailiffs of the Crown to protect the navigation of the river, but have no right to the soil and freehold of it, and that what they have done is not authorized by the powers belonging to them as conservators or bailiffs of the Crown. It is against this part of the information that the demurrer is directed. The information then goes on to allege certain grants made by the appellants in exercise of their supposed right to the soil or bed of the river, and

charges that the embankments made under those grants are nuisances; and it prays, that the rights of the Crown and of the appellants respectively may be ascertained; that issues, if necessary, may be granted; and that perpetual injunctions may also be granted against the persons who are making the said embankments, so as to prevent them from making any such, except under license of the Crown, and that those already made may be ordered to be abated. The defendants put in an answer and demurrer to this information. The answer of the appellants alleges that the particular acts which are charged as nuisances are not nuisances, and the appellants then demur generally as for want of equity. The appellants have adopted this course; they have endeavoured to take out of the information all those allegations which relate to nuisance, to which they answer, and they demur to all the rest.

The portion of the prayer of the bill which the appellants answer, prays, that the embankments on the river, or so much of them as have been executed, may be abated, and the river restored to the situation in which it was before the embankments were made. Singularly enough, they leave standing and unnoticed the prayer that the licensees of the Corporation may be restrained, by perpetual injunction, from making such of the embankments in question as have only been partly begun without the license and permission of her Majesty.

Now, according to the information and the case stated, although the injunction is not prayed for as against the Corporation or the Lord Mayor, it is prayed that parties not claiming a title to the property, but acting under a licence from the Corporation, may not be permitted to proceed with their works. The effect therefore of this demurrer, if it should be allowed, would be, that so much of the information as is the subject of the demurrer, so far as the parties demurring are concerned, may be struck out

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of the cause, and they would then go on upon those parts only to which the answer has been applied, and therefore without any prayer for injunction so far as the appellants are concerned, but with the prayer standing upon the injunction so far as the other defendants are concerned. They would go to a hearing upon that part of the prayer to which I have before alluded, namely, that the embankment made may be prevented from being made.

The information also alleges that the Corporation, as conservators and bailiffs, have violated their duty towards the Queen, as proprietor of the soil, in granting licenses for those embankments, and alleges that they have received fines and rents and other emoluments from the parties to whom those licenses have been granted, and prays an account of what they have so received.

If the rule is to prevail in the present case, which has prevailed in all other cases upon subjects of demurrer, that all the matters demurred to are true in fact, your Lordships are to assume, upon the matters demurred to, that the corporators of the city of *London*, acting through the Lord Mayor, in the exercise of their civil power, are only the conservators and bailiffs of the *Thames*, and have, in violation of their duty as such conservators, granted licenses which they were not authorised to grant, and have, in so doing, received profits, which, as bailiffs and conservators, they were not entitled to receive, but for which, being so received by them, they are answerable to the Crown for which they are acting.

It is said by the learned counsel for the appellants, that you must not pick out of the information a passage here and there, and put them together, but look to the main subjects of the information. Now, I conceive that a party is entitled to pick out particular parts of the information to make out his case; that, upon the information as it stands, admitting all the facts to be true as stated, when the party comes to a hearing of such allegation he may,

upon the face of the information, select such facts as are admitted, and as will entitle him to relief. It is quite immaterial in what part of the information you find this ground for relief, provided it is to be found there, the facts being so admitted, and the Court being called upon to give effect to the information.

If this information should be brought to a hearing, and all that which the demurrer admits should appear to be true, there cannot be a doubt as to the title of the Crown to the relief which the information prays. What does the information charge? That the Crown is proprietor of the soil; that the defendants are merely conservators, and have, in violation of their duty, granted licences, and have, by means of such violation of duty, taken fines and emoluments which they were not entitled to receive. It is perfectly true that the information shews a pretence of title, but the allegation of the pretence of title is no admission that such title really exists. If it was, the information alleging that the Crown is entitled, and that the defendants are not, those facts being taken to be true, the information would then present a case for relief, upon that admission of facts. I apprehend that to be so beyond all doubt.

The case has been argued, and necessarily argued, as if this was in substance an ejectment bill, a bill seeking to recover possession of land, and, so far, as an endeavour by a court of equity to assume a jurisdiction which properly belongs to a court of law. It is perfectly well known that very many ejectment bills, which, in point of fact, and in substance, are ejectment bills, are so framed as to be incapable of being met by demurrer, and in that way the jurisdiction of a court of equity has been sustained. Parties frequently, under the pretence of contesting the right to cut timber, have come into equity, and used title-deeds, which really raised the question of the title to the estate itself, and various other expedients have been resorted to for the purpose of endeavouring to bring such a matter

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within the jurisdiction of a court of equity. If the bill be properly framed for that purpose, it precludes the opposing party from demurring, but it does not prevent the objection to the bill being raised when the case comes on for hearing, because then, when the facts are known, if it appears that the real question between the parties is the title to the freehold, the court of equity, notwithstanding the facts are true, as stated, may and does, and properly does, refuse to interfere, upon the ground of its being a matter of law only, and therefore not within the jurisdiction of a court of equity. That is not the case here. If the facts, as stated here, are true, there is no question of freehold raised; because, if the facts are true, the Crown is entitled to the freehold, the defendants hold under the Crown certain privileges only, and, having been guilty of an abuse of those privileges, are bound to answer to the Crown. How is it possible that the rule which applies to cases of this class can be so construed as to make the demurrer tenable? Is it possible, the facts being true, to say that a case has not been made out for the interposition of a court of equity? I take the whole general scope of the statement of the information into my consideration when I put this question. Here is an allegation of title in the Crown, and there is an allegation also of abuse of privileges granted by the Crown to the appellants, and then comes the general charge of the possession of documents which are alleged to relate to matters herein before mentioned—"all the matters herein before mentioned,"—and you cannot take them otherwise. The language is clear and distinct, and therefore the demurrer admits that the papers and documents (the production of which is refused by the demurrer), do relate, or may relate—it is the same thing—to those matters amongst others; some of these matters being denied by the answer, and others being admitted by the demurrer.

Upon these grounds it appears to me that this House

would not be doing its duty, and would very much tend to relax the rules of pleading (which rules, if they are to be relaxed, are not to be relaxed by decision in a particular case), if it overruled the pleadings in this case, by expressing an opinion upon points which in my opinion do not arise in this case, upon matters of very high importance, which ought only to be decided where there is no doubt at all as to the mode and form in which they are brought forward for decision. I therefore move your Lordships to affirm the judgment of the Master of the Rolls.

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*Lord Campbell.*—My Lords, I take exactly the same view of this case with my noble and learned friend who has just addressed the House. If it was necessary to decide that great question of the construction of the Act, 5 Vict., as to the transfer of the jurisdiction exercised by the Court of Exchequer in revenue causes, in what may be called the equity side of the Court of Exchequer, to the Court of Chancery, I should certainly wish to have time to consider it, and I should probably request that we might have the assistance of the judges in considering it; but I think that question is not at all necessary for us to decide, and therefore I give no opinion upon it.

I proceed upon the second reason given in the respondent's case, "because the facts stated by the information, and covered by the demurrer, furnish a proper and sufficient case to entitle the Crown to the relief prayed by the information, and demurred to, on some part thereof in the Court of Chancery in the ordinary exercise of its equitable jurisdiction, and independently of the jurisdiction transferred to that court by the above statute." It seems to me to be quite clear, that if this information had been filed in the Court of Chancery before the act of Parliament referred to had been passed, the demurrer could not have been sustained. Is there not a case for the equitable jurisdiction of the Court of Chancery that is not covered by the demurrer? Whatever other question there may be that



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may be raised with respect to the soil of the river, is there not enough raised to show that this is a case for equitable relief? It is expressly averred that the bed and soil of the river *Thames* belong to the Crown. It is expressly alleged that the mayor and corporation of *London* are conservators of the river, and that they are, as such and for that purpose, the agents and bailiffs of the Crown. It is expressly alleged, that in violation of their duty as agents of the Crown, they have granted licences to embank the soil of the river, and that they have received money for so doing.

These are the facts, and I entertain no doubt that they establish a clear case for the interference of the Court of Chancery. It seems to me that the Crown has as good a right to relief in this case, as in the case, which I believe has occurred more than once, where the keeper of a royal forest has granted a power to depasture upon it, or to cut timber upon it, or has even made a grant of part of the soil of the forest. Can there be any doubt that, in such a case, he would be liable to an information in the Court of Chancery?—and would have been liable before this statute of the 5th of *Victoria* was passed, to account for what he had received through a breach of his duty as agent for the Crown. It seems to me that these conservators of the river *Thames* stand exactly in the same relation to the Crown? If these facts are alleged, which we must now take to be true, I think there is enough to support the jurisdiction in equity. The facts as alleged may be wholly unfounded; hereafter it may turn out that the Crown is not so entitled, for that the soil and freehold of the bed of the river *Thames* do belong to the Corporation and City of *London*; but at present, and on these pleadings, we must suppose that the Crown is seised of them, and that the Mayor and Corporation have held them only as bailiffs, and have been guilty of a breach of duty by granting these licenses, and receiving money for the licenses. Under these circumstances it appears to me quite clear that this is a case in which the information

may be maintained by the Crown in the Court of Chancery without any transfer of any new power to the Court of Chancery from the Court of Exchequer, and, that therefore, this demurrer must be overruled.

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*Mr. Bethell.*—In the Court below, the Master of the Rolls held, what I humbly submit to be the universal principle, that the Crown neither receives nor pays any costs. Therefore, after discussion there, the demurrer was overruled without costs.

*Mr. Maule.*—There is no such rule as that the Attorney General never pays costs. One of the last cases which was decided upon the subject was that of the *Attorney General v. Lord Ashburnham (a)*, where Sir *John Leach*, in a case where a charity information had been filed, without a relator, under the 59 Geo. 3, c. 91, held that the Court had jurisdiction to order the defendant to pay costs to the Attorney General. In the course of his judgment there he expressly stated that there was no such general principle in Equity, as that the Crown cannot receive costs.

*The Lord Chancellor.*—That case does not apply here, where the Attorney General sues as an officer of the Crown in right of the Crown. As such he does not pay costs. I do not mean to say that a case may not occur in which the Attorney General would be liable to pay costs, but then where private parties have no chance of getting costs, and they have none here, the Court is cautious how it makes them pay costs. I think the judgment must be affirmed, without costs.

Order affirmed, without costs.

(a) 1 Si. & St. 394.

1848. THOMAS BOURKE RICKETTS - - *Appellant.*  
March 20, 21.

WILLIAM TURQUAND, and others - *Respondents.*

*Heir-at-law.*  
*Evidence.*  
*Issue.*  
*Will.*

IT is the ordinary rule of a court of equity, in cases where an heir disputes the will, to grant an issue to try that question; but where he does not dispute it, but acts under it, merely denying that certain portions of the land pass under the description used in it, a court of equity has full jurisdiction to determine the question thus raised, without granting an issue, or may grant such issue at its discretion.

In such a case parol evidence of what was considered, in the lifetime of the testator, to be the extent of the lands constituting the estate, is receivable.

A testator, who described himself as of "*Ashford Hall*, in the county of *Salop*," devised "all my estate in *Shropshire*, called *Ashford Hall*," to trustees, for sale:

Held, that this description was not confined to the mansion-house so called, and the lands immediately adjoining, but extended to such other lands in *Shropshire* as he possessed at the time of making his will:

Held also, that the court of equity, in a suit to enforce the trusts of the will, might receive parol evidence to shew what the testator had been accustomed to consider the *Ashford Hall Estate*.



THIS was an appeal against a decree of the Master of the Rolls in a suit brought by the assignees of one *John B. Ricketts*, under the following circumstances:—

In the year 1862, *George Crawford Ricketts*, Esquire,

purchased an estate in *Shropshire*. The conveyance of this estate, effected by deeds of lease and release, of the 1st and 2nd of *October* in that year, thus described the premises purchased :—"All that capital messuage or mansion house, with the gardens, shrubberies, stables, fish pools, coach-house, out-buildings, and appurtenances thereunto belonging, called *Ashford Hall*, heretofore the residence of *Jonathan Green*, deceased, and afterwards of *Thomas Stokes*, lately of *Charles Edward Nugent*, and now or late of *William Henry Worthington*; and also all that piece or parcel of meadow land, or ground adjoining to the said mansion-house, called the *Lawn*, and all that meadow adjacent to the said lawn, and containing, with the said lawn, twenty-eight acres, two roods, fourteen perches, and occupied with the said mansion-house; and also all those three several pieces of meadow or pasture land, lying together, now called the *Team-side Meadow*, the *Marl Brook*, the *Gravel-pit Piece*, and the *Gaul Meadow*, and containing in the whole, by estimation, forty-one acres, and now or late in the possession of *Richard Hodnet*; and also all that newly-erected barn, with the fold-yards, sheds, and appurtenances, and all those several pieces or parcels of meadow ground, pasture land, orchard and arable land, all lying together, and containing in the whole, by admeasurements, eighty-one acres and twenty-one perches, and called by the names of *Stoneybridge Meadow*, the *New Tending Orchard*, the *Barn-close Meadow*, the *Brick-kiln Field*, the *Shaw*, the *Fish-pool Field or Meadow*, the *Upper and Lower Hollyditch*, *Young Woodfield*, and the *Upper and Lower Lawrence Furlongs*; and also all that messuage in the village of *Ashford Bowdler*, with the barn, out-buildings, and several pieces or parcels of meadow or pasture land and orcharding, containing five acres; and also all that piece called the *Little Meadow*, containing one acre; and also all that orchard, piece or parcel of land or ground, heretofore called *Hollyditch Orchard*,

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and now or lately called Wheatal's Field, or Wheatal's Orchard, containing one acre and one rood, or thereabouts; and also all that croft or piece of meadow land formerly called Twist Oakfield, and heretofore lying open with the Gravel-pit Piece aforesaid, containing one acre or thereabouts: all which said hereditaments and premises (except the said piece called the Fish-pool Field or Meadow, containing four acres and two roods, which lies in the parish of *Richard's Castle*, in the said county of *Salop*), are situate, lying, and being in the parish of *Ashford Bowdley*, in the said county of *Salop*; and also all that piece or parcel of arable land, now or lately known by the name of the Church Land, formerly part of the estate of *Henry Jordan*, and situate at *Overton*, in the parish of *Richard's Castle* aforesaid, and also the tithes," &c.

The appellant, the eldest son of Mr. *G. C. Ricketts*, married in 1804, and on occasion of that marriage, a settlement to the amount of 4,000*l.* was made by Mr. *G. C. Ricketts* on his son and the intended wife, and this sum was charged on the purchased property, by deeds, dated on the 19th and 20th *July*, 1804, in which the estate was described in the same manner as before, omitting, however, the references to "Team-side Meadow, Marl-brook, Gravel-pit Piece, and Gaul Meadow," and also the references to the messuage in "*Ashford Bowdler*, and the Little Meadow," and also to the "Church Land in the parish of *Richard's Castle*."

In 1808 *G. C. Ricketts* made his will, in which he described himself as "of *Ashford Hall*, in the county of *Salop*," and by which, among other things, he devised as follows:—"As it is my wish and desire that all my estate in *Shropshire*, called *Ashford Hall*, should be sold, I do therefore give and devise the same unto my son, *Thomas Bourke Ricketts*, and my son-in-law, Rev. *R. D. Hallifax*, and the survivor of them, and the heirs of such survivor, in trust to sell and dispose of the same, for the most

money that can be got for the same. The proceeds of such sale, after deducting what may be due on the mortgage given on my eldest son's marriage, I give and bequeath unto my sons, *John B. Ricketts*, *G. W. Ricketts*, and my daughters, *M. B. Anderson*, *E. B. Hallifax*, and *L. F. Ricketts*, in equal proportions, share and share alike." The testator appointed Mr. *Hallifax* and *T. B. Ricketts* his executors.

The testator died in 1811, and the executors some time afterwards advertised for sale in five lots the estate comprised in the indentures of *October 1802*, and the printed particulars described it as consisting of "a substantial mansion called *Ashford Hall*, a walled garden, hothouse, pleasure grounds, lawn, and sundry rich inclosures, the whole including about 166 acres." As no sale was effected on this occasion, the two executors, in *July 1812*, employed Mr. *Christie of London* to sell the estate, and, with their knowledge, particulars were circulated, in which it was described as "a most desirable freehold estate, consisting of a substantial convenient mansion, called *Ashford Hall*, in excellent repair and neat condition, with stabling and offices of every description for the complete accommodation of a family, walled kitchen gardens, lawn, pleasure ground, and rich inclosures, altogether 121 acres and upwards." No sale took place on this occasion.

In *September 1823*, the appellant, on behalf of himself and the other executor and trustee, contracted with Miss *Harriet Buckley* for the sale to her of the mansion-house and appurtenances, and thirty-three acres of land, for the sum of 3937*l.* 10*s.*, and this purchase money was applied in part satisfaction of the mortgage of 1804.

In 1831 *J. B. Ricketts*, who on the death of his brother, *G. W. Ricketts*, had become entitled to that brother's share, became bankrupt, and the plaintiffs were appointed assignees of his estate. They then filed a bill, and afterwards an amended bill, against the trustees and children

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of the testator, praying that the will might be declared well proved and established; that an account might be taken in respect of the monies received by the trustees from the sale of such part of the *Shropshire* estate as had been sold, and of the rents received by the same parties; that a rent might be fixed by the master, and paid by *T. B. Ricketts* in respect of his occupation of the mansion house and appurtenances previously to the sale thereof to *H. Buckley*; that the unsold part of the *Shropshire* estate might be sold, and two-sixth parts of the proceeds thereof paid to the plaintiffs, and a receiver appointed in the mean time.

The defendant, *T. B. Ricketts*, put in four consecutive answers to the original bill, and the like number of answers to the amended bill. By the former he alleged that the estate called *Ashford Hall* consisted of a capital messuage, with the garden, shrubberies, stables, fish pools, coach house, outbuildings, and appurtenances thereunto belonging, containing about ten acres; that the said capital messuages, without the said shrubberies and fish pools, was in common parlance called *Ashford Hall*, and was so called before part of the said shrubberies and fish pools conveyed therewith to the testator, under the same name, was purchased from an adjoining estate, and added thereto; that the testator was at the time of making his will, and thenceforward till the time of his death, seised in fee simple of the real estate in the county of *Salop*, containing altogether 154 acres or thereabouts, and which, according to the defendant's knowledge and belief, did not form any part of the testator's estate called *Ashford Hall*, but went and was known to the testator by the names and descriptions of "the *Ashford* Estate," "the *Ashford* Farm," "the Forty Acres," "the House in Village," and others mentioned in the mortgage security for 4000*l.*; and under such circumstances the defendant, as the heir at law of the testator, submitted that the words "all my estate in *Shropshire*, called

*Ashford Hall*," consisted of the premises comprised in the said ten acres, and did not include any other estate or property of the testator situate in *Shropshire*; that the estate called and distinguished as *Ashford Hall*, was, at the time when the testator made his will, of greater value than the amount of the mortgage debt of 4000*l.*; that to the best of the defendant's knowledge and belief, the testator never spoke of or called the other real estate of 154 acres, or any part thereof, "*Ashford Hall*, or his "*Ashford Hall* estate;" and the defendant, by the same answer, insisted that the hereditaments and premises containing 154 acres or thereabouts, descended to the defendant as the heir at law of the testator. The defendant, in his answers, likewise stated his belief that the estate and hereditaments, consisting of the particulars set forth in the bills, did not before the 28th of *September* 1798, belong to the same proprietor, and were not considered before that time as one estate, but that after that time they were called and known by the aggregate name of *Ashford*, or the *Ashford* estate, and continued to be so called and known to the testator up to the time of his death, and not called or known by the aggregate name or names of the *Ashford Hall* estate, or the estate of *Ashford Hall*.

The defendant admitted that he had principally acted in the execution of the trusts of the testator's will since the testator's death; that the estate and hereditaments in question, so purchased by and conveyed to the testator in the year 1802, were treated and considered by the defendant, up to the time of preparing his answers to the original bill, but not since, and by his co-trustee during his life, as one and the same devised estate and hereditaments; but he stated that they were not so devised, because the testator never did call the said estate and hereditaments *Ashford Hall*, but called them his *Ashford* estate; and that if the devise was not altogether invalid by reason of the uncertainty of the description of the property, still, nothing in law

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passed under the words "all my estate in *Shropshire* called *Ashford Hall*," except that part of the purchased premises which was described and distinguished from the other parts of the estate and hereditaments, as being called *Ashford Hall*, in the several conveyances to and from the testator, that is to say, "all that capital messuage or mansion house, with the garden, shrubberies, stables, fish pools, coach-house, outbuildings and appurtenances thereunto belonging, called *Ashford Hall*;" that the conveyance to Miss *Buckley*, containing the recital of the testator's desire as expressed in his will, to the effect that all his estate in *Shropshire* called *Ashford Hall*, including the hereditaments thereafter described, should be sold, was inadvertently executed by the defendant, and that the words "including the hereditaments thereafter described," were artfully inserted by the purchaser who prepared the conveyance, to give an appearance of title; and that the conveyances to and from the testator were in favour of the defendant's claims as heir at law, by showing that the testator had an estate which in title, viz., "the capital messuage, with the gardens, shrubberies, fish pools, coach-house, outbuilding, and appurtenances, called *Ashford Hall*," completely answered the description in the will of "all my estate in *Shropshire* called *Ashford Hall*."

Evidence was adduced on the part of the plaintiffs to the following effect:—that *T. B. Ricketts* had, in a correspondence, declared that he considered himself as a trustee of the property in question for the benefit of himself and the other legatees named in the testator's will, and treated the property, up to the time of a sale of a part thereof to Miss *Buckley*, as one entire and undivided estate. It was also proved that the estate and premises were purchased as one entire estate by a person named *Stokes* in 1797; that *Green* was the sole proprietor thereof during several years before *Stokes* became the owner, and that before *Green* became the owner, the estate and premises belonged to one *Hall*, who devised them to *Green*; and

by the conveyance to *Stokes* as well as by deeds of prior date, the *shrubberies and fish pools* were mentioned amongst the parcels thereby conveyed, and by the evidence of numerous witnesses, several of whom had lived in the vicinity of the estate for very many years past, the estate was represented by them to have been known as one entire and undivided estate, and called by them and the testator, and those living in its vicinity, as the *Ashford Hall* estate, or the *Ashford* estate. There was also evidence adduced of a map having been made of the estate in 1811, by a witness named *Evans*, by the direction of the solicitor of the trustees, and of a lease which had been granted to a witness named *Carter* of a considerable portion of the estate by the trustees, *T. B. Ricketts* and *Hallifax*. There was also evidence adduced of the letters written by *T. B. Ricketts* to Miss *Buckley*, pending the treaty for purchase by her of part of the property, showing that he considered himself a trustee of the whole of the property, and also of the proposed agreement with Miss *Buckley* in 1828, wherein he was described as a trustee.

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No evidence was offered to the court on the part of the defendant.

The cause came on to be heard before the Master of the Rolls, on the 20th, 21st, and 22d days of *February*, 1844, and by a decree then made, his Lordship declared that the will of *George Crawford Ricketts*, the testator, was well proved and ought to be established, and the trusts thereof performed and carried into execution, and that the whole of the testator's estates in *Shropshire* passed by his will. And he decreed that it should be referred to the Master to take an account of all sums of money which had been produced by the sale of the mansion house and lands to Miss *Buckley*, and received by the defendant (the appellant), and how much of such sum was properly applied by the defendant in paying off the mortgage for 4000*l.*; and further directions were reserved.

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Mr. Serjeant *Manning* and Mr. *Warren* for the appellant.

The decree of the Master of the Rolls is erroneous ; he has given a greater effect to the words than they can legally bear. The whole estate did not pass by the will. The Master of the Rolls has said that the whole of the estates in *Shropshire* passed by the will, yet part of what the respondents call the *Ashford Hall* estate is not within the county, and if ejectment should be brought to recover the lands in *Shropshire*, it must be confined to those which were within the county. The decree directs that all the estates (not estate, but estates), in *Shropshire* shall be sold. Under that decree the trustees would be bound to sell all the tithes of the lands, and to account to all the devisees in trust.

[Lord *Campbell*.—Did you make that point before the Master of the Rolls, or make any objection to the minutes of the decree?]

No objection of that kind was made. But though that particular point was not taken, this House will not affirm a judgment which on the face of it is erroneous. Now, it is clear that the land tax and the tithes would not pass under this devise, and therefore a decree, declaring that all the estates passed, is erroneous.

The rule to be applied in this case is that which is stated in *Wigram's Treatise on Extrinsic Evidence*, where it is said, "The question of expounding a will is not to discover what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words."

[The *Lord Chancellor*.—That merely intends that you are not to speculate on the meaning].

It is clear, on the facts of this case, that the entirety of the property was not intended to be given, and it could not be so intended, for in 1799 three of the closes, which are

said to have passed, were exchanged for other closes. There is no ground for saying that this devise of "all my estate in *Shropshire*, called *Ashford Hall*," has any other application than to that particular property, which was originally conveyed to Mr. *Ricketts* by that name. This is clear, for several reasons. First, because there is property which never was held by the former proprietors of the estate ; secondly, because the phrase will not cover the redeemed land tax, or the tithes, or the rent-charge created, in lieu thereof, by statute. In order to convey these, the party must have used very different language, and his not having done so must be taken as proof of what was his real intention.

It is curious enough that in no one part of the will does the testator use the phrase which alone would justify the argument on the other side. In no one part does he say " my *Ashford Hall* estate : " he invariably speaks of it as his estate called *Ashford Hall*, which plainly restricts his meaning to a particular portion of the property. In the settlement of *July 1804* he so refers to it, and that mode of describing it he continued to the last. So that if evidence of his acts is to be given as evidence of his meaning, it is clear that he did not convey all the estates he was there possessed of, but only that part of them which had received the specific designation of *Ashford Hall*.

[The *Lord Chancellor*.—Your argument would go to shew that only the mansion-house and ten acres adjoining it would pass].

That is so. The argument has a double aspect. The testator may not have said what he did intend to say, or he may have said what he did not intend to say, and in either case the heir-at-law would be entitled. There is no ground for any strained construction of the words of this will, in order to try to arrive at the intentions of the testator, for he knew well how to express himself ; he was a lawyer ; and when, as in another part of the

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will, and with reference to another estate, he intended to pick out a particular portion of his estate, he knew how to do it.

[Lord Campbell.—Then you think that he intended to die intestate of the one hundred and fifty-four acres ?]

He did. The rule which was laid down in the case of *Doe d. Oxenden v. Chichester (a)*, must govern the present case, namely, that where there is a sufficient estate to satisfy a devise according to one meaning of the words employed, collateral evidence is not admissible to shew that the testator meant to use them in a more extensive sense. In this case the admission of such evidence is improper, because there exist a capital mansion-house and several acres of land exactly answering the description given in the will ; besides which, there can be no doubt that the testator used the description in the sense in which it had been used when he purchased the estate four years before he made his will. He knew that he had other estates in *Shropshire*.

[Lord Campbell.—You must not forget that he uses the word “all” before “my estates.”]

That does not affect the question. “All” would describe his interest in the property, and might not be employed with any other view. If he had said “all my *Ashford Hall* estate,” that would have been sufficient ; but he being a lawyer, and knowing the effect of restrictive words, has used them, and spoken only of all “my estate called *Ashford Hall*.”

[Lord Campbell.—Does not that bring it to a question of evidence, namely, what was the estate which went by the name of the *Ashford Hall* Estate in 1808 ?]

It may do so.

[Lord Campbell.—Then, if it comes to the weight of evidence, is not that fatal to your argument ?]

(a) 4 Dow. 65, affirming the judgment of the Common Pleas, 3 Taunt. 147.

It is not ; for you must take the proof of what the testator called it, not what it was called by the tradesmen of any neighbouring village.

[The *Lord Chancellor*.—It must be the name by which it was generally known.]

Suppose he bought ten acres of bare ground without any name, and then disposed of it, calling it the Rookery ; if what was meant by “ the Rookery ” should afterwards become a question, the best evidence of what the testator meant must be obtained, and the question then would, in fact, be parcel or no parcel. But here a specific estate, which had long had a specific name, was dealt with by that name, and no such question arises.

[The *Lord Chancellor*.—It is stated in the bill that all these lands “ were treated by the testator as one individual estate, and called and known by the name of the *Ashford Hall* estate.”]

That statement is utterly unsustained by the evidence.

[The *Lord Chancellor*.—That is another matter ; but that statement strictly relates to the question which you now say is the question in the cause.]

The evidence of what other people called the estate is evidence of a dangerous class. It must indeed be assumed, that if all the world knows an estate by one particular name, the testator would use that name in the same way as all the rest of the world. But, in the first place, the evidence here is not conclusive to shew that all the world did know the whole of the testator’s estates to be included in the term the estates of *Ashford Hall* ; and, in the next place, there is not one scrap of paper to shew that he used the phrase in such a sense, while there are deeds in existence which shew the probability that he used the phrase in a much less extensive sense.

If this house should be satisfied that in fact the testator intended to dispose of only part of the estate in *Shropshire*, the decision of the case would be thereby affected.

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Now there is a doubt upon this subject; and if there is a doubt upon it, then the legal proposition arises that the heir at law is entitled. In *Jarman* on Wills it is said (a). "Conjecture is not permitted to supply what the testator has failed to indicate; for as the law has provided a definite successor in the absence of disposition, it would be unjust to allow the rights of this ascertained object to be superseded by the claim of any one not pointed out by the testator with equal distinctness. The principle of construction here referred to has found expression in the familiar phrase, that the heir is not to be disinherited unless by express words or necessary implication." The doctrine thus stated is supported by the cases of *Thomas v. Thomas* (b), *Doe d. Ashforth v. Bower* (c).

If the devisee has hitherto acted under an erroneous impression as to the extent of his rights, that will not affect them; or change the authority of the devise itself. Here the devisee was in the army and with his regiment, and the mortgage deeds, which might have informed him of the real nature of his rights, were with the mortgagee, so that he was without the means of forming a correct opinion; he cannot therefore be bound by anything that he has said or done under such circumstances.

Under the circumstances which exist in this case, the proper course of proceeding was not by bill. In a case of *Strickland v. Strickland*, which was recently before the Court of Chancery, the Lord Chancellor said that equity was not the proper place in which to try a question of partly legal title.

The *Lord Chancellor*.—We think that we need only trouble the respondent's counsel on the difficulty occasioned by the words of the decree, as to their effect on the tithes and the land tax. The testator devises "all my

(a) Page 315.

(c) 3 Barn. & Ad. 453.

(b) 3 Barn. & Cres. 825.

estates in *Shropshire* called *Ashford Hall*." Now it appears by the conveyance that there are tithes there. The decree is peculiar; it declares that the whole of the "testator's estates in *Shropshire*" passed. That would include the rent charge and the land tax. Unless the respondents can make out that they are properly included, the decree would on the face of it appear to go beyond the words of the will. That would create some difficulty, though it would not affect the ultimate disposal of the appeal. If the words were altered in this way, that the whole of the "testator's lands in *Shropshire*" passed, and it was referred to the master to inquire what were those lands, then it might be directed that such lands should be declared to pass by the will.

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Mr. *Turner* (Mr. *Parker*, Mr. *Hallett*, and Mr. *Heathfield*, were with him) for the respondents.—The difficulty as to the land tax can be easily removed. When the testator purchased the land tax he was the owner of the fee, and consequently the land tax would pass under the term "land," for the land tax is merged in the land. As to the tithes, it is clear, on the appellant's own showing, that no claim to them has been set up by the respondent. [He was stopped.]

The *Lord Chancellor*.—My Lords, this appears to be a very clear case, and one which ought not to have been brought here for reconsideration. The Master of the Rolls was clearly of opinion, upon grounds which appear to be perfectly unshaken by any observations that have been made by the counsel who have addressed the House, that this was the proper decree to be made. In the first place, it has been argued as if a Court of Equity has no jurisdiction to adopt the course which the Master of the Rolls had adopted; but nothing can be more erroneous than that supposition. The bill is filed for the purpose of executing a trust. Reference has been made to some observations which I am supposed to have made in *Strickland v.*



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*Strickland*, and an interpretation has been attempted to be put upon them, which those observations do not warrant. They were not then made for the first time, because it is the established doctrine of a court of equity, that the court will not entertain a suit for trying an adverse title to land; but here the party could not try the question at law. This is the case of a trust; the assignees are calling on the devisees under the will, the trustees, to account for property in which the bankrupt is interested under the will. Now, if the heir at law had disputed the will, as in the ordinary cases, if there had been no special circumstances, such as exist in this case, he might have said, "I do not admit the will, and there must be an issue to try it." But his right to do that is gone by; he does not ask to have an issue *devisavit vel non* to try the validity of the will; but he says there are certain portions of the lands which do not pass by the description the testator has used in the will. The plaintiff says, "You are trustees for me of all the testator gave to you in trust;" and the question arises as to whether a particular description of the lands sought to be taken out of the devise did or did not pass by it; that is a question which a court of equity must try, unless there should appear to be a difficulty on the evidence, in which case the court, in order to ascertain what the fact may be, is in the habit of sending it for trial by issue. It is a question strictly within the jurisdiction of the court to ascertain to what extent the trust goes; and there are no means of ascertaining that, otherwise than by coming to a court of equity. The Master of the Rolls has so treated it, and beyond all doubt that is the rule of a court of equity.

Then how does the case stand? It stands thus: that the bill, in very distinct terms, twice over in the course of the statement, says, "That before and up to the time of the date and execution of the last-mentioned indenture of release, the hereditaments and premises thereby conveyed and therein comprised, had been, and the same were

considered as one estate, and were called and known by the name of the *Ashford Hall* estate, or the Estate of *Ashford Hall*, and that they continued to be called and known by such name or names, by the said *George Cramford Ricketts*, after he had become, in manner aforesaid, the purchaser thereof, and up to the time of his death ;” and in a subsequent part it contains a passage, which, having before read, I will not again refer to, and in which the same proposition is repeated, and the same allegation made, that it was called by the testator his *Ashford Hall* estate. The plaintiff, therefore, put directly in issue the ground on which he considered the words of the will passed the whole of the property ; of course, having put that in issue, and the defendant having put in the last of his eight answers, the cause went to issue in Chancery, and the proposition which the plaintiff contended for, being, that this property did pass by that description, he proceeded in the regular course to prove the proposition which he had stated, namely, that the estate was used as one estate, and acquired the name from the former proprietor of the *Ashford Hall* estate, or the Estate of *Ashford Hall*, and that the testator had himself occupied it as one estate, and had himself called it or described it as the *Ashford Hall* estate, and that he was in the habit of so doing. Various instances are brought to prove this proposition, and, beyond all doubt they do prove it. Whether on cross-examination of the witnesses who supply this proof, it could have been shown that they had no sufficient means of knowledge, is a matter which does not appear on their depositions. Over and again they say the testator did so call it, and that is the appellation they give it, and they prove all that the allegations in the bill assert as the foundation of the plaintiff’s claim. Now the party interested in meeting these allegations and contradicting what those witnesses were called to prove, enters into no evidence at all. Of all persons he was

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the best able to know what the testator's views were with regard to his own property. He was the eldest son ; his father was in possession, and nobody could be more capable of establishing the fact of his father's intention in not describing, or intending not to describe the property, as alleged in the bill ; but no witnesses of any kind are called. It remains, therefore, on the evidence, such as it is, which is produced by the plaintiff, and not upon any other. There are various witnesses—very many in point of number—all of whom speak positively to the fact ; and in that state of the evidence is a court of equity to say that there is a doubt ? A doubt can only be raised on a conflict of evidence or by cross-examination, which will show that the parties who speak to facts have no means of knowing the facts they depose to. But to neither the one nor the other has the defendant had recourse : he has not attempted to shake the evidence produced by the plaintiff, nor has he, by bringing evidence on his own part, done that which was necessary to contradict the allegations in the bill. Therefore, whatever the real facts are, we can only judge of them by that which is put in issue and proved in the cause ; and by those facts, so put in issue and so proved, it appears that the testator was in the occupation of this property as one estate, and that he did describe and call it the "*Ashford Hall* estate," or "the Estate of *Ashford Hall*," and I have been unable to discover the difference between the one and the other ; they both mean to describe the same thing. Whether the word "estate" is put after or before "*Hall*," cannot, in my opinion, make any difference as to the meaning which the person who uttered those words, when he described the estates, meant to attach to the words so used.

It is very true that, in the deeds under which the testator derived title, part of the estate is described as the *Ashford Hall* estate, and then the deed goes on to describe other parts of the lands according to names or descriptions, not

necessarily including those other pieces of land in the description of *Ashford Hall*, describing *Ashford Hall* as the mansion-house. No doubt that must originally have been the name of the mansion-house, but how common is it for an estate to get the name of the mansion-house? First of all, it is such and such a *Hall*, then it is the *Hall* estate. It is by no means inconsistent with strong probability that the testator, even if he had obtained the lands from different quarters, was anxious to get them into one estate, and that he called the whole by one name; that is sufficient to shew what he meant by the terms used in his will. Here he procured it all from one source, except that one portion of land which he gained by exchange, and that part would well fall within the description of the original property. It is not unnatural that those parts so taken in exchange for other parts of the estate would fall within the same description, and be considered as a part of the estate to which they were added, and then the evidence is that such was the mode in which the testator dealt with the property, and such the appellation he gave to it; and that directly meets the allegation contained in the bill.

Then we have what I consider the most potent evidence of all; the heir being disinherited as far as this property goes, he being most interested in finding out that the property did not pass from him as heir; we have the extraordinary fact that from 1811, when the testator died, down to I do not know how long ago, he knew of this devise, acquiesced in it, dealt with the estate as trustee, conveyed part of it to another person, and then described all the lands as passing under this appellation contained in this recital:—  
 “And whereas the said *George Ricketts*, by his last will, duly executed, and bearing date the 26th of *April*, 1808, expressed his wish and desire that his estate in *Shropshire*, called *Ashford Hall*, including hereditaments hereinafter described, should be sold.” We have therefore this, which I use as evidence; it is not an estoppel if it

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turns out that he was in error; but as matter of evidence, we have the heir-at-law acting in this way. This deed bears date in 1824, the death having been in 1811. Many years, therefore, after the testator's death, during the whole of which time the appellant had ample opportunity for considering what his rights as heir-at-law were, we have him reciting the fact that the devise was intended to include all the lands, and that it was not confined to the mansion-house. Who could know better what the testator meant to describe by the terms that he used in the will than the heir-at-law himself? If, my Lords, we had had the heir-at-law himself personally examined, and he had said that his father had always called these lands "the *Ashford Hall* estate," and had so dealt with them that he intended by the terms used in his will to include all that property which, in his lifetime, he always considered as included in that appellation, would there have been any difference? All we are in search of are the terms by which the testator was in the habit of describing the property. It is proved, beyond all doubt as to the real history of the facts of the case, that the testator did so consider it, and that the terms which are used in his will are the correct terms, and, therefore, that the property is described in a manner so as to pass the whole by that description.

We have nothing whatever to do with the case that has been referred to, where there was clearly a contradiction, and where you could go into evidence to show what the testator meant, without contradicting the terms of the will. If he describes lands in a particular parish by a particular name, or in a particular locality, you cannot go into evidence to show he meant by the general appellation to include something out of it; you cannot do that without contradicting the express terms used. Here is a term which included more or less land according to what was meant by the term used, and all we are in search of is the

particular meaning of the expression which is used. It does appear to me that we have found that upon this will, and that there is not the least doubt that the Master of the Rolls has come to a right conclusion.

I therefore move your Lordships to affirm the decree of the Master of the Rolls, with costs, because, although as a matter of precaution, there is to be the inquiry which I have mentioned and shall propose to direct, the absence of direction that there shall be such an inquiry is not the ground of the appeal. After all it may turn out that the inquiry may be nugatory, and there seems reason to believe it will be so at least as to the land tax, but that is a matter which will be evident on the report, and it certainly is not an objection to the decree, which ought to protect the party appealing from paying the costs of the appeal.

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*Lord Campbell.*—My Lords, I think the Master of the Rolls did quite right in stopping the reply when the case was heard before him, for it would have been a great waste of the public time further to hear the case debated at the bar. I believe it would likewise have been a waste of the public time if we had called upon the respondent's counsel to argue the questions which have been submitted to us by the appellants. I regret that such a case should have been so debated in the court below, and I deeply regret that it should have been brought by appeal before your Lordships.

The first question, my Lords, which we are called upon to determine, is this, whether the bill should be dismissed? for I find the reasons conclude with this, "For the above reasons the appellant humbly submits that he is entitled to a reversal of the said decree, and to a dismissal of the plaintiff's bill." The plaintiff's bill is to be dismissed for these reasons, that it is uncertain whether, under the will, a house and twelve acres of land, or a house and 166 acres of land, passed, and on account of

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this uncertainty, we are gravely told that the will is void, that there is no question to be determined, and that, therefore, the bill should be dismissed. That is an argument which the learned Serjeant who argued it must have been, by great importunity and against his own better judgment, induced to offer to your Lordships.

The question is, whether in this case the appellant, as heir-at-law, is *ex debito justitiæ*, entitled to an issue. Now there is nothing more certain than that it is the rule of a court of equity, where the *factum* of a will is disputed, where the heir-at-law says that the testator was *non compos*, or that he was imposed upon; or that the formalities requisite for executing a valid will have not been observed, and without the assistance of a jury, to require the heir-at-law to renounce all his property, or to declare the will established, so as to disinherit him; but no authority has been cited to show that that applies to a case where the question is, as to the boundaries or the parcels of the property. There cannot be any such rule in such a case; because in many cases where, in a valid will, the question is as to the extent of the property which is enjoyed under it, that may be made as clear as the sun at noon-day, and it would be very inconvenient if there was a rule that, under such circumstances, the heir-at-law, admitting the competency of the testator—admitting that the will was well made according to the Statute of Frauds, or the Statute of Wills, which has since been passed, that in all cases with such testimony, there must be the delay and expense of a trial at law. There has been no authority cited to prove such a position, and in my opinion the Master of the Rolls, in this case, was fully justified in refusing the application for a trial.

Then we come to the question as to the merits, and it is difficult, upon this record, to insist that the 154 acres did not pass under the will; and the question is, whether, upon the evidence before the Master of the Rolls, as Mr.

*Warren* most legitimately argued, these lands did or did not pass.

It is quite clear that the case of *Doe d. Oxenden v. Chichester* (a), does not at all apply here; for there the question arose as to the admissibility of parol evidence with regard to the construction of a will, but here parol evidence must inevitably have been admitted. The words of the devise are these, "As it is my wish and desire that all my estate in *Shropshire*, called *Ashford Hall*, should be sold, I do therefore give and devise the same unto my son *Thomas Bourke Ricketts*, and my son-in-law, the Rev. *R. F. Hullifax*, and the survivor of them, and the heirs of such survivor, in trust, to sell or dispose of the same." What is there devised, is, all the testator's estate in *Shropshire*, called *Ashford Hall*, and evidence must be admitted to show what the estate in *Shropshire* is, which the testator called "*Ashford Hall*." This then is not a case in which the question arises whether evidence shall be admitted to show the natural meaning of words which are in the will. We have here to consider what was the estate which the testator had in *Shropshire*, called *Ashford Hall*, and on that question evidence must be given. The question was, did the 153 acres or not belong to, and were they to be considered a parcel of the estate called *Ashford Hall*, or not? The evidence on that subject is so clear and satisfactory, that it would have been much to be regretted if the Master of the Rolls had granted an issue to try it. He had jurisdiction himself to decide it on the depositions before him, without granting an issue. If there had been any reasonable doubt about it, he would have done well to grant an issue, but as there was none, he did much better to take it on himself to decide on the evidence before him, which is all on one side; for there is not a particle of evidence on the other side to show that

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*v.*  
*TURQUAND*  
 and others.

(a) 3 Taunt. 147; 4 Dow. 65.



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the whole of this estate was not called *Ashford Hall*, except the description in the conveyance some years before. But the question is, what was called the estate of *Ashford Hall* at the time the will was made? What was called the estate of *Ashford Hall* one hundred years before, or any number of years before, is not the question. On that point, however, I must say, notwithstanding the observations made upon the evidence, that I cannot see that there is any discrepancy among the witnesses, because, whether the estate was sometimes called "*Ashford Hall*," or "the Estate of *Ashford Hall*," or the "*Ashford Hall* estate," they were all terms used without discrimination, for describing the thing, by those in the neighbourhood, and by those who knew the property.

Then, my Lords, the question of what passed by the description of "the estate called *Ashford Hall*" being expressly put in issue, there is no evidence at all given by the appellant to contradict the evidence which is brought forward on the part of the respondents. The best evidence that could have been given was that of the appellant himself: he had been, for a course of years, conversant with the property; he knew what it was his father possessed; he knew what name it went by when the will was made; and we find him, by the usage of a course of years, giving evidence that the whole of this was what was to be considered as the *Ashford Hall* estate. It is true that that is not an estoppel; it is nothing which, in point of law, estops him from setting up his claim, but it is evidence: he is an important witness against himself; and he, giving evidence in this manner for a long series of years, joining in the solemn act of conveying the estate, as well as advertising it in the terms which the Lord Chancellor has read from the documents in evidence, it appears to me, must be taken to have proved what the estate was. It is much too late for him now to deny that which he has himself so strongly admitted to be the case.

Under these circumstances, I think that the Master of the Rolls was fully justified in coming to the opinion he pronounced, and in decreeing that all the lands of the testator, in the county of *Salop*, passed to the trustees under the will.

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I agree, my Lords, that it is much better, *ex abundanti cautela*, to introduce the words into the decree which have been suggested. I should be exceedingly sorry if such a variation had at all affected the right of the respondents to costs; and I entirely concur in the motion which has been made, that the decree should be affirmed, and with costs.

The *Lord Chancellor* then put the motion, and declared the appeal to be dismissed, with costs.

On the application of Mr. *Turner*, and by the consent of Mr. *Serjeant Manning*, the words "mansion-house and lands" were substituted for the word "lands," in the declaration.

Mr. *Serjeant Manning* applied that the order for costs should be restricted to the costs of one set of appellants; but the House directed that the order should be general.

Mr. *Serjeant Manning*.—The appellant was bound to come here, my Lords, on account of these tithes.

Lord *Campbell*.—No; if that had been pointed out when the minutes were settled, it would have been immediately corrected.

Decree affirmed, with a variation, and with costs.

1848.  
March 23.

HENEAGE'S DIVORCE BILL.

*Standing  
order,  
No. 142.*

The enforcement of the Standing Order of the House, requiring the petitioner in a divorce bill to present himself for examination at the bar, may be dispensed with on account of the state of his health.

*Damages by  
consent.*

The acceptance, by the petitioner in a divorce bill, of an offer of a certain sum upon a writ of inquiry to assess the damages, after judgment by default, in an action of *crim. con.* against the wife's paramour: *Held*, under the circumstances, not to be a bar to the bill.

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Two points only, worth noticing, occurred in this case.

1st. The petitioner's personal attendance on the second reading of his bill, in compliance with the standing order of the House, No. 142, was dispensed with, upon proof that his domestic affliction affected his health so much that he was obliged to go to a warm climate, and he was then in the south of Europe.

2nd. In the action brought by the petitioner against his wife's paramour for criminal conversation, the defendant having suffered judgment by default, his counsel, upon the opening of the writ of inquiry before the sheriff, to assess the damages, offered a sum of 500*l.*, which offer was accepted by the petitioner's law agent, and the jury then gave a verdict for that sum and costs.

The agent, being particularly examined by some of the Lords of the Committee on that matter, said he had previously ascertained the circumstances of the defendant; that he had sold his commission (of Captain) in the army; was the younger son of a baronet, and possessed of no property; that there were several witnesses ready to be

examined before the sheriff, on behalf of the petitioner, as to the manner in which he and his wife lived together, up to the time of her elopement; that when his counsel rose to state his case to the jury, the defendant's counsel, without previous negotiation or intimation, addressed him, and offered 500*l.* and costs, which offer witness accepted, after conferring with the counsel and friends of petitioner; that said sum had not been paid, but, the defendant having gone out of the jurisdiction, the necessary steps to outlaw him were promptly taken.

The bill was read a second time, and afterwards passed. (a)

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(a) In the course of the evidence in support of *Chippendall's* Divorce Bill (8th of *February* 1848), a witness said, the petitioner's action at law against the wife's paramour "was settled by a judge's order, the defendant confessing damages to the amount of 50*l.*, and the plaintiff's attorney taking the judgment for that sum." *Judgment confessed. Damages by consent.*

The Lord *Chancellor* asked the petitioner's counsel (Mr. *Terrell* and Mr. *Joyce*) whether they could refer to any precedent of a divorce bill passing, when the judgment at law had been taken by consent?

The Counsel said they were not aware of any, but submitted that in this case the judgment could not be said exactly to have been taken by consent, it being only the amount of damages that was so taken, and that, no doubt, with a view to save the delay and expense of a writ of inquiry.

The bill was afterwards withdrawn, but whether on this or on other objections, did not appear, as the House pronounced no opinion. It appeared that the petitioner had left his wife before her adultery, to seek employment in *Belgium*, and that he did not take proceedings promptly to get rid of her, after the adultery, both which objections were met by evidence of the petitioner's poverty,—for which he was admitted, upon petition to the House, to prosecute his bill in *forma pauperis*. *Petitioner for a divorce, in forma pauperis.*

|                         |                                             |             |                            |
|-------------------------|---------------------------------------------|-------------|----------------------------|
| 1848.<br>April 3, 4, 6. | ROBERT LAPSLEY and others<br>JAMES GRIERSON | -<br>-<br>- | Appellants.<br>Respondent. |
|-------------------------|---------------------------------------------|-------------|----------------------------|

*Evidence.*      THERE is no absolute presumption of law as to the continuance  
*Presumptions.*      of life, nor any absolute presumption against a party doing an  
*Legitimacy.*      act because the doing of it would make him guilty of an  
 offence against the law. In every instance the circumstances  
 of the case must be considered. (*The King v. Twynning*, 2 B.  
 & A. 386, explained).

*A.*, a Scotchman, married in *Scotland* and went abroad; his wife  
 cohabited with *C.*, and had children by him. To make such  
 children legitimate it was held necessary for those who asserted  
 their legitimacy, to prove either a legal origin of the cohabita-  
 tion, or a change in the nature of it after the death of *A.* had  
 become known to all the parties. The mere fact that *C.* and  
 the woman continued to live together was not sufficient for  
 that purpose. Under such circumstances the children were  
 held illegitimate, though born after the date of *A.*'s death.

*Quere* : *C.* and *B.* live together as man and wife, in the *bond fide*  
 belief that *A.*, to whom *B.* had been lawfully married, was  
 dead; in fact he was alive : will his subsequent death, during  
 the continuance of their cohabitation, confer on it, according to  
 the law of *Scotland*, the character of a legal marriage ?

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WILLIAM LAPSLEY, sen., of *Glasgow*, in the month of  
*December*, 1792, made his will, by which among other  
 things, he disposed of certain heritable property belonging  
 to him in *Glasgow*, to trustees, for the benefit of his four  
 children, *William*, *Robert*, *James*, and *John Lapsley*, for  
 life, with benefit of survivorship, and to their children, or  
 the children of the survivors in fee. The testator died in  
 1798, leaving these four sons him surviving. *Robert* and

*James* died unmarried, and their shares survived to their brothers, *William* and *John*. *William Lapsley* went to *Canada*, married, and died leaving two children, *Sarah* and *William*. The appellants are the two children of *John Lapsley*, the youngest of the four brothers, and the question in the case was whether they were or were not his legitimate children.

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*Robert*, the survivor of the four sons of the testator, died in *Anderston*, in 1817, and *Sarah* and *William*, the two children of *William Lapsley*, were, in 1819, served heirs of all their grandfather's (the testator's) property. They held undisputed possession of this property until the year 1826, when they sold it to the father of the respondent for a sum of 1400*l*. The purchaser continued in possession as undisputed owner under this sale until the year 1834, when *Robert Lapsley*, weaver in *Kirkintilloch*, and *Joanna Margaret*, his sister, the wife of *John M' Ewan*, of *Glasgow*, claimed a right to one half of the property as lawful children and heirs of *John Lapsley*, who died in *Glasgow* in 1810. These two persons, the children of *John Lapsley* and of *Janet M' Kinley*, whom they alleged to have been his wife, were born between 1807 and 1810.

The claim was resisted, and in 1836 the appellants instituted a suit to reduce or annul the title of the respondent to the property in question, and likewise to have themselves declared the lawful children of *John Lapsley*, the youngest son of the testator. They alleged that *Janet M' Kinlay*, their mother, had been thrice married, first to *James Kidd*, who died about the end of the year 1796; secondly to *William Paul*, who left this country for *America* in 1801, and was lost on his passage from *New York* to *St. Kitts*, in 1804 or 1805; and thirdly to *John Lapsley* in 1807. The first two marriages were admitted, but the respondent denied the third, and alleged that *John Lapsley* and *Janet M' Kinley* cohabited unlawfully soon after *Paul's* departure from *Scotland*, and that the coha-

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bitation thus unlawfully commenced, was continued till the death of *John Lapsley*, but had never changed its character during his life. The legitimacy of the claimants was therefore directly put in issue.

The case came on before Lord *Cunninghame*, as Lord Ordinary, who heard evidence on the subject, and on the 20th of *May*, 1845, his Lordship pronounced an interlocutor, finding that the parents of the pursuers "were cohabiting, and generally held by habit and repute to be married persons, for three years at least prior to the death of *John Lapsley* in 1810, and consequently that the pursuers were entitled to, and did possess from their birth, the status and repute of his lawful children." The case was taken before the judges of the second division of the court of session, and by them the interlocutor of the Lord Ordinary was reversed. This was an appeal against that reversal.

Mr. *Wortley* and Mr. *Anderson*, for the appellants.

The *onus* of proof lies in this case upon the party impeaching the marriage. The law will not presume illegality of this serious kind—it must be shewn to exist: *Cunningham v. Cunningham* (a), and *Williams v. The East India Company* (b).

[Lord *Campbell*.—Do you mean to contend that the party impeaching a marriage, on account of its having been contracted when a former husband was alive, must shew that he was alive within a short time, a fortnight for instance, before it took place?]

Certainly—for the law presumes innocence, not guilt. The *King v. Twynning* (c). There, a woman twelve months after her first husband was last heard of, contracted a second marriage, and it was held on appeal that the sessions did right in presuming, *primâ facie*, that the first husband was dead at the time of the second marriage,

(a) 2 Dow. 482.

(c) 2 Barn. & Ald. 386.

(b) 3 East, 192.

and that it was incumbent on the party objecting to the second marriage, to give some proof that the first husband was then alive. The doctrine in that case was agreed to in the subsequent case of the *King v. Harborne* (a), though the particular circumstances there were held sufficiently strong to rebut the presumption of innocence. But this second case does not in the least degree shake the authority of the former, in which Mr. *Justice Bayley*, lays down in strong terms, that the "law presumes against the commission of crimes," and that presumption he there considers to overrule the ordinary presumption of the law in favor of the continuance of life. He adopted the ruling in the case of *Williams v. The East India Company* (b), in which it was held, that where an act is required to be done by one, the omission of which would make him guilty of a criminal neglect of duty—the law presumes that such act has been done, and throws the burden of proving the negative on the party who insists upon it. That case was well considered, and Lord *Ellenborough* then distinctly laid down the rule which Mr. *Justice Bayley* afterwards, in the *King v. Twynning*, as distinctly adopted.

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Mr. *Turner* and Mr. *Rolt* for the respondent.—The question of fact here is, whether there was a marriage between *John Lapsley* and *Janet Paul*, in 1807. On that question the evidence merely shews a continuance of a cohabitation previously commenced. Now if that cohabitation was in its origin unlawful, from the fact that *W. Paul* was alive at the time it began, it could not become lawful by mere continuance, but required some decisive act, such as a regular marriage, to give it a new character. There is no evidence in this case of such an act having been performed. The marriage set up here is at best an irregular marriage, and all the circumstances

(a) 2 Ad. & El. 540; 1 Har. 2 Wol. 36.

(b) 3 East, 192.



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connected with it must therefore be considered; *Jolly's Case (a)*.

Those circumstances disprove the pretence of an actual marriage. There is no evidence here of consent after the death of *Paul*, except that which is afforded by the fact of the parties continuing to live together. That alone is not sufficient. It is said that they cohabited in good faith, in the sincere belief that *Paul* was dead. That good faith might, perhaps, be an answer to an indictment for bigamy, or an excuse after conviction, but it will not legitimatise children born from such a connection.

Marriage is a contract. There must be both the will and the ability to consent at the time the contract is made. Habit and repute are only evidence of consent. But when the evidence of habit and repute commences at a period when the spouse of one of the parties is actually living, it amounts to nothing, and though it should continue till and after the death of that spouse, it will still amount to nothing; for there must be a legal origin of a marriage, evidenced by habit and repute. There cannot be a conditional contract of marriage. No two people can agree to live together, treating each other as man and wife, if a third person, spouse of one of them, should prove to be dead, but not to be man and wife, should that person prove to be living. Where such a connection has once existed, there must be a distinct change in its nature, after the impediment to the marriage has been removed, or the parties can never become husband and wife. Lord *Eldon* laid down that proposition broadly, in *Cunningham v. Cunningham (b)*, and he afterwards said (c), "When the cohabitation of man and woman was not known to have been in its origin illicit, the presumption was that it was lawful. But where it was at first notoriously illicit, a change in the character of the connection must be operated. He could not admit that mere cohabitation as

(a) 3 Wils. & S., 189. (b) 2 Dow. 505. (c) 2 Dow. 506-7.

man and woman was cohabitation as man and wife." These observations answer the arguments on the other side, as to presumption of legality and illegality. In the *King v. Twynning* (a), the second marriage was in form a perfectly valid marriage, and the only question was, as to the time at which, under such circumstances as existed in that case, the death of the first husband could be presumed. But here no marriage took place, and the presumption of the law, if it made any presumption, would be, that the parties had not married; for a marriage, under the circumstances of their first cohabitation, would certainly have subjected them to the penalties of bigamy.

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Mr. *Wortley*, in reply.

The law will always presume against illicit intercourse; but even supposing that the connection here was illicit in its origin, a time arrived when it no longer bore an equivocal character; and that time preceded the birth of either of these appellants. The woman wore mourning for *Paul*, and when her children were born, christened them by the name of *Lapsley*, with whom she was then living.

[Lord *Campbell*.—Do you admit that it would not be a valid marriage, if the parties merely said to each other, "We are married, if it should turn out that *Paul* is dead?"]

That may be admitted; but, in fact, they believed that he was dead. They acted *bonâ fide*, and the presumption of the law must be in their favour.

The Lord Chancellor.—This case appears to me to depend on the evidence as to the facts. That evidence establishes the fact, that cohabitation had commenced when *William Paul* was living. The nature of that cohabitation was not altered by any undoubted and open act of the parties; there was no change in their demeanour after the period at which it is now believed he died. The

(a) 2 Barn. & Ald. 386.

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cohabitation continued as at first, and the first cohabitation appears to have taken place at a time when *William Paul* was, in fact, alive, and when there was no reason to believe that he was dead. The rule, therefore, applies, that the cohabitation was illegal from the commencement, and consequently there is no proof of a marriage between these parties, because at a subsequent period the disability to contract marriage between them had ceased. Every thing turns, in this case, upon matter of fact. I have no doubt about the case; and, in my opinion, the illegitimacy of the children is conclusively established.

Lord *Campbell*.—The law upon this subject is well settled, but particular circumstances were said to exist in this case. We may deplore the loose state of the law of Scotland upon the subject of marriage, and, in our legislative capacity, we may afford a remedy to that evil; but, sitting here as judges, we are bound to administer the law as it now exists. There is not, in this case, any controversy as to the law of Scotland. The pursuers rely on the marriage of the parents to be established by habit and repute, which may establish a marriage by affording evidence of consent. On the other hand, the defender relies on the rule of the law of Scotland, which is not disputed, that if the connection was in the beginning illicit, it must continue to bear that character, unless it is clearly changed by the parties. That rule was established by this House, in the case of *Cunningham v. Cunningham* (a), and has ever since been the settled law of Scotland. In this instance, there is clear evidence of habit and repute, for a part of the time during which the parties were living together. There is no doubt that, at a certain period of their lives, they lived together as man and wife; but then the objection is made that this connection was illicit in its origin, and its original character was never changed by any direct and open act of theirs. Was this connection

(a) 2 Dow: 482.

illicit in its origin?—and if so, was its nature ever changed? Now, the first of these matters does not seem to me to admit of any doubt; the connection was illicit in its origin, and there does not seem to be any reason for saying that its nature was afterwards changed. It is said that the woman must have married *Lapsley* in 1806, as she had a child in 1807: and none till then. But that argument involves a presumption, on which it is impossible for us to found a judicial decision. Besides, we cannot disbelieve the evidence, that the connection between these parties originated in 1803; and, if so, *William Paul* was undoubtedly alive at that time; for a letter, written by him in 1804, has been produced in evidence. It was at first said, that at that period he was dead; but the *onus* of proving him to have been dead lay on the pursuer. Then it was argued, that the law would not presume the commission of a crime, and consequently would not presume the connection to have been illegal; but that it must be positively shewn to have been so. But the main question is, was there, or was there not, a valid marriage; and we cannot presume that there was. The marriage must be proved to us.

We have been much pressed with the case of the *King v. Twining* (a), but what is said there by Mr. Justice Bayley has been much misunderstood. He who was one of the most learned, accurate, and conscientious of judges, never laid down what in this argument has been attributed to him. All that he said was, that there were presumptions of law on both sides, and that as the quarter sessions had come to a conclusion on the facts, the Court of King's Bench would not say, that in fact they had come to a wrong conclusion. In the subsequent case of the *King v. Harborne* (b), Lord Denman intimated a strong opinion, that the *onus* of proof lay on the party setting up the

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(a) 2 Barn. & Ad. 386.

(b) 2 Ald. & El. 540.

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marriage. Now beyond all controversy, the connection here was illegal in its origin.

An important question was purposed to be agitated in this case, namely, whether supposing the first husband to have been alive when the children were born, they were still to be considered illegitimate, both their parents believing that he was dead. That, no doubt, is a very important question, but it does not arise here, for it is clear to me, that here neither of the parents did entertain that belief. There was *mala fides* from the beginning to the end of the proceeding. I concur with the *Lord Chancellor* in the opinion, that the interlocutor of the court below should be affirmed.

*Lord Brougham*.—I have been requested by my noble and learned friend (*Lord Campbell*) to look into the case, and into the elaborate opinions pronounced by the learned judges in the court below. I have done so, and have no difficulty whatever in stating, that the conclusion to which I have come is, that the interlocutor pronounced in the court below should be affirmed. I was first a little hampered by the arguments of the *Lord Advocate* and of *Lord Cunningham*. If the death of *William Paul* was believed *bonâ fide* before the cohabitation, then the fact being contrary to their belief, the belief being groundless, but the cohabitation proceeding on that belief, if afterwards *William Paul* died, and the cohabitation continued, I might have had some difficulty in saying that this cohabitation, which was in fact illegal, but was founded on the *bonâ fide* belief of the death of the first husband, and of the character of man and wife being lawfully assumed by these parties, did not become licit by the death of *Paul*. But when I come to look into the facts of the case, I do not think that I am at all called on to consider that question. This is a case entirely of fact, and the evidence satisfies me, that in fact these parties did not live together as man and wife.

Judgment of the court below affirmed with costs.

## IN COMMITTEE FOR PRIVILEGES.

## THE BARONY OF SAYE AND SELE.

1848.

THE illegitimacy of a child, born of a married woman, is established, beyond all dispute, by evidence of her living in adultery at the time when the child was begotten, and of her husband then residing in another part of the kingdom, so as to make access impossible. *Illegitimacy by non-access. Evidence.*

Where a Patent of Peerage cannot be found, entries on the Journals of the House of Lords, shewing the limitations of the patent, may be referred to for that purpose; or an examined copy of the record of the patent will be received.

KING *James I.*, by letters patent, dated the first year of his reign,—after reciting that *James Fenys*, knt., was summoned to Parliament, by writ, in the twenty-fifth of *Henry VI.*, and was, in the same Parliament, created a baron of *England*, by the title of Lord *Saye and Sele*; that his son and heir *William Lord Saye and Sele*, was summoned to and sat in several Parliaments in the reigns of *Henry VI.* and *Edward IV.*; and that *Richard Fenys*, knt., was then (1603) the lineal heir male of the said *William* and *James*—"not only recognised, allowed, and confirmed to the said Sir *Richard*, and the heirs of his body, the said title and dignity, but also constituted and created him, Baron of *Saye and Sele*, to hold to him and the heirs of his body." He sat in Parliament as Lord *Saye and Sele*, and, upon his death, the honor descended to his son *William*, who was created a viscount by patent, dated the 22nd of *James I.*, to hold to him and the heirs male of his body. The son sat in Parliament under both patents, and died in 1662, leaving four sons, the eldest of whom, *James*, succeeded to the honors, and died in 1673, leaving only two

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daughters, *Elizabeth* and *Frances*, whereupon the barony fell into abeyance, but the viscounty passed to the next brother of *James*, and to the issue male of him and of another brother, successively, until, on failure of such issue, it became extinct in 1784.

The said *Elizabeth Fenys* (or *Fiennes*, as the name was then spelt), elder daughter of *James*, Baron and Viscount *Saye and Sele*, married *John Twistleton*, and left issue by him one daughter only, who married *George Twistleton*, of *Woodhall, Yorkshire*, and died in 1723, leaving *Fiennes Twistleton*, her eldest son and heir, who married, and had issue one son, *John*, and three daughters, and died in 1730. *John* married, and having issue three sons, died in 1763.

In 1781, *Thomas Twistleton*, the then eldest surviving son of *John*, presented a petition to the king, claiming the barony, the abeyance of which had been terminated in 1715 by the failure of issue of *Frances*, second daughter and co-heiress of *James*, the last baron. That petition being referred to the House of Lords, a report was made to his Majesty that the claim was made out, and the petitioner received his writ of summons to Parliament, and took his seat, according to the letters patent of the first of *James I.* (a). He died in 1788, leaving two sons, *Gregory William* and *Thomas James*; the former succeeded to the title, and died in 1844, leaving one son, *William Thomas Eardley Twistleton Fiennes*, Baron *Saye and Sele*, who died in 1847, without issue. He had an only sister, who had previously died without issue.

In 1847 the Rev. *Frederick Benjamin Twistleton*, rector of *Adlersop*, in *Gloucestershire*, presented his petition to the Queen, claiming the barony, as the only legitimate son of the said *Thomas James*, uncle of the last Lord *Saye*

(a) See the Lords' Jour. for *June 21* and *July 2*, 1781.

*and Sele.* He stated, among other things, that *Thomas James*, his father, married his first wife in 1788, by whom he had issue several children, who all died without issue ; that in 1794 he and his wife agreed, by deed, to live separate, and they never afterwards cohabited together ; that his father went to the university of *Oxford* in 1796, took priest's orders the 22nd of *May*, and in *October* of that year was appointed chaplain to the "*Monmouth*" ship of war, and served in that ship till *October*, 1797 ; that the wife, after the separation, went upon the stage, and in *March* 1796, and afterwards, lived in *Edinburgh* and elsewhere with *Mr. John Stein*, as his mistress, and was delivered of a male child in *London*, on the 5th of *January* 1797 ; that such child was the fruit of her adulterous intercourse with *Stein*, and was supported and educated by him as his own, and never acknowledged by the petitioner's father, who, after discovering his wife's infidelity, took proceedings against her for a divorce in the Ecclesiastical Court, and obtained a decree there, and afterwards an Act of Parliament, dissolving the marriage, on the ground of the said adultery, but brought no action against *Stein*, being advised that, on account of the separation, he could not maintain an action ; that, after the passing of the act of divorce, he married his second wife in *June* 1798, and died in *Ceylon*, in *August* 1824, leaving by her the claimant, his eldest son and heir.

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The petition being referred to the Attorney General, he reported to her Majesty that the evidence laid before him was sufficient to establish the claim, " provided it should be proved that the said male child was illegitimate by reason of the non-access of the husband ;" and he advised her Majesty to refer the petition to the House of Lords, and added, that " as the case depended entirely on the evidence of *Mr. Stein*, who was of great age, it was important to the claimant that his examination should be taken at the earliest possible opportunity."



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The petition, with this report annexed, being referred by her Majesty to the House of Lords, towards the end of the Session of 1847, the Lords Committees for Privileges, considering that the claimant had not time to prepare and lay his case before the House in that Session, appointed an early day for Mr. *Stein's* examination, *de bene esse*, and he was examined accordingly; and his evidence, which was ordered to be printed, sustained the allegations of the petitioner relating to his intercourse with Mrs. *Twisleton* in 1796 and 1797, and to the birth and education of the child.

The claimant presented his printed case to the House early in the present session, and *Stein* again attended as a witness, but the committee having his former evidence before them, dispensed with his examination *de novo*. It was shewn by other witnesses, and by a correspondence, that the claimant's father was in *Devonshire* or *Oxford* during the time when the child, born of his wife in *January* 1797, must have been begotten, and that she was in *Edinburgh* from the 20th of *January* 1796, to the end of the month of *April* the same year. For further proof, the libel, depositions, and decree of divorce in the Ecclesiastical Court, were referred to, and also the evidence on the divorce bill in this House, and the act of Parliament.

The claimant's agents having proved that they searched, unsuccessfully, for the letters patent of the first of *James I.*, entries shewing the limitations of the barony were read from the Journals of the House, containing the proceedings on the claim of *Thomas Twisleton*, in 1781 (a); and

Copy of the record of a patent of peerage admitted in evidence.

Entry of grant to licence received in place of the missing register.

(a) On the claim of the Earl of *Lanesborough* (*April* 11, 1848) to vote at elections of Irish Peers, an examined copy of the record of the patent, produced from the proper office, was admitted for the same purpose, after proof of an unsuccessful search for the patent. And after like proof, in the same case, the copy of an entry, in the Prerogative Office, in *Ireland*, of the grant of a dispensation licence to solemnize a marriage, was admitted to supply the place of the undiscovered register of the marriage.

the resolution of the House, affirming that claim, was received as sufficient evidence of the present claimant's pedigree down to that period.

No question was raised on any other part of the evidence.

Sir *Frederick Thesiger* and Mr. *Unthank* were counsel for the claimant.

The *Attorney General*, for the Crown (b), said, I have carefully examined the evidence which has been given at the bar in support of the claim in this case, and I see no ground upon which I can, in any part of the case, properly offer to your Lordships any objection or suggestion in respect to the facts as they appear before your Lordships. There is no question upon the evidence that the claim is clearly established, provided your Lordships do not desire the question of law to be argued, I mean the question of illegitimacy by non-access, upon which there has been a recent decision of your Lordships' House, varying from the old law, as it was laid down in former cases (c). Upon the fact of the claim of the petitioner being established, there can be no question whatever. Upon the fact of illegitimacy, also, the evidence leaves no doubt; and I have only to appear here to request your Lordships' directions whether you desire the point to be argued as to the legal effect of the proof of non-access upon the question of illegitimacy; if your Lordships should think that matter capable of discussion, and should call on my learned friends to argue it—

Lord *Lyndhurst*. — We do not require the general question to be argued, because we have, in the case referred to, acted upon illegitimacy, as proved by non-

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(b) The *Attorney General* attends, in Peerage cases, as assistant to the Lords Committees for Privileges, and it is said that he is entitled to sit (on a chair) inside the bar.

(c) See *Morris v. Davies*, 5 Clark & F. 163.

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access ; but the question is as to the fact of non-access. If that is proved, it is sufficient.

The *Attorney General*.—I think the fact is already proved, and it would not be right to occupy your Lordships' time in bringing the question of law before your notice, unless any doubt has occurred to your Lordships' minds.

Lord *Lyndhurst*.—You are perfectly satisfied upon the fact ?

The *Attorney General*.—I am perfectly satisfied upon that.

Lord *Lyndhurst*.—I believe all the noble Lords who heard the evidence are also satisfied.

The *Attorney General*.—After the case of *Morris v. Davies*, I apprehend that there can be no question raised on the law of the case.

The Lord *Chancellor*.—There is an extraordinary concurrence of circumstances in this case, shewing the impossibility of access of the husband during the period of the child being begotten. The facts are quite consistent, and the evidence brings the case within the rule of law established by the recent authorities.

Lord *Lyndhurst*.—The rule of law as to non-access in a claim of Peerage is precisely the same as the rule of law as to non-access with respect to property.

It was then resolved that the Rev. *Frederick Benjamin Twisleton* had made out his claim to be Baron *Saye and Sele*.

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|----------------------------|---|---------------------|---------------|
| JOHN FLEMING and others    | - | <i>Appellants.</i>  | 1848.         |
|                            |   |                     | April 17, 18. |
| ARCHIBALD SMITH and others | - | <i>Respondents.</i> |               |

A vessel insured under a time policy from *August* 1841 to *August* 1842, encountered very severe weather in the *Indian* seas, and was compelled, in *May* 1842, to put into the *Mauritius*. The master wrote to the owners, telling them of the injuries which the vessel had received, of the necessity to make extensive repairs, of his intention to borrow money on bottomry for that purpose, of the sum required, and of the impossibility of getting the money except on the undertaking to return direct to *England*, instead of proceeding to *Bombay*, as originally intended. He further stated, that on account of the very low state of freights in *India*, this would be better for their interests, which he said he consulted in everything he did. The agents for *Lloyd's* at the *Mauritius*, who were employed by the Captain to act for him, wrote letters to the same effect. These letters were received at intervals between *September* and *December* 1842, and in the latter month the owners wrote to the agents expressing their surprise at the amount required, but saying, at the same time, that they supposed what was done was the best that could be done under the unfortunate circumstances in which the ship was placed. The owners wrote to agents in *London*, apprizing them of the expected arrival of the vessel, and directing them to do what was needful. The vessel did arrive on the 27th of *March*, and was at first taken possession of by the agents for the owners. On the 30th of *March* the owners abandoned to the underwriters :—

*Insurance.*  
*Abandonment.*  
*Constructive*  
*and actual*  
*total loss.*

**Held**, that under these circumstances they were not entitled to recover as for a total loss ; for, first, assuming notice of abandonment to be necessary in a case of constructive total loss, the notice here had not been given in time ; and secondly, the conduct of the owners on the receipt of the letters amounted to an election to treat this as a partial loss, and they could not afterwards, on the arrival of the vessel, when they found that the cost of repairs much exceeded the market value of the vessel itself, convert this partial into a total loss.

Though the master may, by an ordinary rule of law, be considered,

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whenever the vessel is, by capture or other detentions and casualties, prevented from continuing the voyage, as the agent for all parties concerned, yet the owners, even under such circumstances, may by their conduct make him their sole agent, so as to be bound by his acts.

*Per Lord Campbell.* Notice of abandonment is necessary in order to convert a constructive into an absolute total loss.

The cases of *Cambridge v. Anderton*, and *Ross v. Salvador*, show that where a ship, in consequence of the inability of the master to get it off the rocks where it has struck, has been actually sold, or where a cargo of a perishable nature has been so damaged by the sea that its substance is gone, and it can never reach the destined port in specie, the loss, in each instance, is actual, and not constructive total loss.

Where a prudent owner uninsured would have sold, the case amounts to one of actual total loss.

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THIS was an appeal against a decree of the Court of Session. The appellants, as the owners of the ship *William Nicol*, had effected an insurance on that vessel for the period of twelve months from the 18th of *August*, 1841, valued at 6000*l.*, and they claimed as for a total loss occurring in the month of *May* or *June*, 1842. The respondents, who were the underwriters on the policy, insisted that they were only liable for a partial loss.

On the 12th of *April*, 1842, the vessel sailed from *Port Adelaide* to *Bombay*, and on the 18th of *May* encountered very tempestuous weather, and was driven into the *Mauritius*, where it arrived on the 31st of *May*. The summons set forth the facts very fully, and alleged that by these occurrences the vessel sustained serious damage in the hull, and “was not in a reparable state, or in a state to be beneficially repaired, considering the means of repair and the expenses, but was totally lost by the perils of the sea.” The summons then went on to allege, that attempts were made to repair the ship, that money was advanced on bottomry, and the ship was repaired, took in a cargo of

sugars, and arrived in *England* on the 27th of *March*, 1843, when it was found that the vessel and the freight were not equal in value to the amount secured by the bottomry bond, which was given for 4536*l.*, and that the ship was abandoned by letter to the underwriters on the 30th of *March*, 1843.

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The cause was sent to the Jury Court for trial on an issue directed to determine whether the vessel was totally lost in the month of *May* or *June*, 1842, or whether the loss was only an average loss. The cause was tried before the Lord President; when evidence was given to show that on the arrival of the vessel at the *Mauritius*, Captain *Elder* put himself into communication with the house of *Hunter* and Co., the agents there for *Lloyd's*, in order to have the injuries sustained by the vessel ascertained. On the 5th of *June* he wrote (the letter was received on *September* 5) to his owners, "It is but right to inform you that the copper in the ship was entirely gone, nearly one third being washed off; it must have been very bad. The ship must be hove down to see if there is anything wrong; and if it should be for your interest to condemn the ship, if the repair should amount to so much as to make your one-third part of the insurance, which you will have to pay, very heavy, I shall certainly do so, as the 6000*l.* she is insured for, is, I believe, more than the value; but before I can do this, we must have tenders in, to see that the underwriters will save by selling the ship as she is, than laying out so much money on her. There is one thing I must state, the rigging was entirely done, fore and aft. Eight years was a long time for it to be over mast heads." He then gave his reasons for thinking that the ship ought to be repaired, and added, "whatever I may do, I shall act according to the best for your interest." On the 9th of *June* he wrote another letter, in which he said, "we could not have made money at any rate with the present rate of freight from *Bombay*." On the 5th of *July* he wrote a

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third letter, giving an account of his proceedings, estimating the expense of repairs at about 3000*l.*, and saying, "Now the ship being insured for 6000*l.*, the loss to the insurers would have been too great for abandonment, and on that account it could not have been effected for any consideration. For your interest I must raise money on bottomry . . . The accounts from *India* are very disheartening; freight is not to be had but at a very low figure, which would occasion a loss to the shipowners. If I can make from here 2500*l.* to 3000*l.* freight, direct home, it will, I think, be certainly best for your interest." Messrs. *Hunter, Arbuthnot*, and Co., wrote to the owners in nearly the same terms. One of their letters, dated on the 16th of *July*, said, "Captain *Elder* is naturally anxious to follow his instructions, and proceed, when repaired, to *Bombay*. For this purpose he has advertised for a loan of about 20,000 dollars, to be secured by a bottomry bond on the ship, which would proceed to *Bombay* in prosecution of her voyage. No offers however were made on those terms, but parties are ready to advance the money provided the ship proceeds to *England* direct. Captain *Elder* will therefore be obliged to deviate from his instructions, and we have offered him a cargo of sugar at the first of the season for *England*, at the current rate of freight, which, we think, is better for all parties than to go on to *Bombay* in search of a cargo at the miserably low rate of freight ruling in *India*. We shall keep you informed from time to time of what is going on, and when the repairs are completed, we shall forward to you all the documents necessary for a settlement with the underwriters." By a letter of the 3d of *December*, 1842, the owners acknowledged these communications, said that they "hoped the measures might turn out to have been the best in the unfortunate circumstances," declared themselves to have been startled by the necessity for a bottomry bond to so large an amount, thanked Messrs. *Hunter* and

Co. for their offer of a cargo for *England* direct, and said, "Should it have been decided to follow this course, we hope the rate of freight will prove such as to compensate in some measure for the loss which must necessarily accrue from the heavy expense connected with the repairs." Other letters of a similar kind were written, and in *December* 1842 the *William Nicol* sailed from the *Mauritius* for *London*, where it arrived on the 27th of *March*, 1843. On the 7th of that month the owners wrote to the Messrs. *Henderson* to act as their agents with regard to this vessel, and those gentlemen accordingly cleared the vessel at the custom house. On the 30th of *March* the owners wrote to the underwriters a formal abandonment of the vessel. The amount secured on the ship by bottomry bond was about 4536*l.*, and the vessel being seized by the bottomry creditor, was sold by him for a sum of 2780*l.* The owners instituted in the Court of Session a suit on the policy to recover as for a total loss. They stated in a letter, that they dated their claim as from the time the vessel reached the *Mauritius*. The underwriters insisted that in point of law there could be no claim as for total loss in a case where the vessel still existed in specie, without a notice of abandonment being duly given; that the owners here, not having given such notice in due time, they had lost the right to abandon; that this was in fact only a case of a partial loss; and, that the owners having repaired the vessel, and applied it to the purposes of trade on their own behalf, had elected to treat the case as one of partial loss.

The jury found "for the pursuers, with leave for the defenders to move the court to enter a verdict in their favour if the court should think fit upon the following points: whether the pursuers are barred from recovering as for a total loss in consequence of abandonment having been necessary, and not having been made in due time, or of the pursuers having elected to treat the case as one of

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partial loss." The court adjudged that the pursuers were "barred from recovering as for a total loss, in respect that they were bound and failed to abandon the vessel in due time to the defenders, and also that they elected to treat the loss as partial." Against that judgment the pursuers brought the present appeal.

The *Attorney General* and Sir *F. Thesiger* (Mr. *Ivory* was with them) for the appellant :

The questions are, first, whether in the case of a constructive total loss, any notice of abandonment is necessary ; secondly, whether, assuming a notice of abandonment to be necessary, the notice here was given in due time ; and, thirdly, whether the owners here have not elected to treat the loss as a partial and not as a total loss. The second and third questions depend on the facts of the case. As to the first question, it is submitted that no notice of abandonment is necessary where the vessel is either lost by being at the bottom of the sea, or by being so seriously injured that it has lost the character of a ship, and is unable to prosecute its intended voyage. The latter was the case with this vessel in *May* 1842. It had then ceased to be an effective ship, and no person acting with prudence or judgment would have expended any money upon it. Can abandonment be required under such circumstances ?

Abandonment is not necessary in the case of an actual total loss ; *Mellish v. Andrews* (a), and *Cologan v. The London Assurance Company* (b) ; in the latter of which Lord *Ellenborough* says it is required, as excluding the presumption that the owner still adheres to the risk as his own. In a case of constructive total loss, there must, it is true, be a relinquishment of salvage, because the contract of insurance is a contract of indemnity. But even

(a) 15 East, 13.

(b) 5 M. & S. 447.

there notice of abandonment is not necessary; *Boyd v. The Royal Exchange Assurance Company* (a); and the two things are essentially different from each other. In *Irving v. Manning* (b) it was not doubted that a party might recover as for a constructive total loss where a ship was damaged beyond repair, except at an expense such as no prudent owner would incur.

[*Lord Campbell*.—A constructive total loss is so, not only with reference to the physical state of the ship, but to the rate of labour where the ship is found, to the value of money there, the price of materials, and the freights to be carried after repair.]

The jury here having found that there was a total loss, the respondents are bound by that finding, and the question of total or partial loss cannot be discussed.

[*Lord Campbell*.—But the verdict here expressly reserves the questions, whether in such a case abandonment was necessary, and whether the notice was given in time. It may be treated as settled that in this case there has been a total loss, but, such as we call in this country, a constructive total loss.]

Then as to such a case, it is contended that notice of abandonment is not necessary. A constructive total loss is still a total loss; and the true distinction is not between an actual and a constructive, but between an actual and a contingent total loss.

If the case is clearly one of constructive total loss, it is the same as that of actual total loss, and notice of abandonment is not necessary. Now what is constructive total loss? The case of *Cambridge v. Anderton* (c), adopting in substance the rule as laid down in *Park on Insurance* (d) shews that there may be a total loss, though the vessel is in fact recovered; and Mr. Justice *Holroyd*

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(a) Not yet reported

(b) *Ante*, 287.

(c) 2 Barn. & Cr. 691.

(d) Vol. I., p. 159, 7th ed.

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there expressly said that the damage sustained may make the loss a total loss ; and he added that in such a case it is unnecessary to give notice of abandonment. Such too was the opinion of the whole court.

It is true that in that judgment the Chief Justice used the expression as to the ship being “ reduced to a mere congeries of planks ;” and that expression is relied on by the other side to show that, in the case of a constructive total loss, the ship must not only have lost the character, but the very form of a ship—must not only be unfit for navigation, but must actually be a mere wreck ; but that was not the meaning intended by the Lord Chief Justice himself to be given to the phrase, nor was it meant to be said that in order to constitute a constructive total loss, the ship should be reduced to the condition of a mere wreck.

[The *Lord Chancellor*.—Assuming that the expression only meant where the ship is so damaged that the repair of it will cost more than the value, and is therefore a case of constructive total loss, still the question is whether notice of abandonment is necessary ?]

It is not: for the ship does not remain a perfect ship, with the mere temporary loss of its use, as in the case of capture or embargo, so that when restored it can at once be employed in the ordinary manner. In such a case, and in such a case only, must the owner give notice of abandonment to the underwriter. *Roux v. Salvador* (a) is not an authority contradicting this position, for there the relinquishment of salvage is confounded with abandonment; and the observations which appear opposed to the plaintiff's right to recover, do not refer to abandonment. The Lord Chief Justice says, “The necessity of abandoning to the insurer all the right of the assured to what may be saved or recovered from the peril insured against, arises

(a) 1 Bing. N. C. 526.

out of the very nature of the contract of insurance, which is a contract of indemnity only." It is plain that these words do not apply to what is ordinarily termed abandonment, but to relinquishment of salvage; and the subsequent expression that the underwriter is to be put into the owner's place as to all the benefit that may be derived from what has been actually saved or recovered from the loss," justifies that view of the judgment. The additional statement there made, that in such a case the owner "must first relinquish to the underwriters all his interest in what remains," is however erroneous, for that is not necessarily a preliminary proceeding.

[Lord Campbell.—When is the relinquishment of salvage to be made?]

On the adjustment of the policy.

[Lord Campbell.—Then nothing is to be done before the bringing of the action?]

It is not necessary to do anything. If there is a total loss, the property remaining becomes *ipso facto* the property of the assured.

[Lord Campbell.—Then is there not a difficulty in saying at what moment the right of the underwriter accrues?]

It accrues at the moment the ship receives its death wound. Such is the doctrine adopted in the United States, *Ruggles v. The General Interest Insurance Company* (a), and that doctrine is in full conformity with every principle of insurance law.

It must be admitted that the first case of *Roux v. Salvador*, shakes the authority of *Cambridge v. Anderton*, but the decision thus pronounced was afterwards denied in the Exchequer Chamber, where the reasons given in support of the judgment were reviewed, and the judgment itself was reversed (b).

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(a) 12 Wheaton's Rep. 408, 414.

(b) 3 Bing. N. C. 266.

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[Lord *Campbell*.—The decision in the Exchequer Chamber proceeded on the ground that the subject matter of the insurance was totally lost. Here the vessel brought home a cargo of sugars.]

But in *Cambridge v. Anderton*, which is set up again as an authority by the Exchequer Chamber in *Roux v. Salvador* (a), and which is exactly the same case, so far as principle is concerned, as the present, the vessel was got off the rock by the purchaser, repaired, and freighted with a cargo for *England*. In *Allen v. Sugrue* (b), the materials of the ship were not lost, but bad.

As to the other questions they are more matters of fact than law. The first is whether, assuming abandonment to be necessary in such a case, it was here given in due time? If the assured was in full possession of all the circumstances, it is a rule of law that he shall communicate them in due time, but whether he was in possession of them or not is a question of fact.

[Lord *Campbell*.—If notice was necessary it lies on you to shew that it was given in due time.]

What is due time is a mixed question of law and fact; but here there is no finding of the fact which raises the question of law. There ought to be a remit on this point.

Then as to the question of election. Every thing had been done before the owners received the letters, and every thing done was the act of the master and not of the owners. In such a case the master is not the agent of the owners alone, so as to bind them, but becomes, by the happening of the peril insured against, the agent for all concerned. The moment the vessel ceases to be an effective sailing vessel, he assumes that character: the case of the ship *Alexander* (c), and *Douglas v. Moody* (d).

(a) 3 Bing. N. C. 266.

(c) 1 Rob. N. S. 346.

(b) 8 Barn. & Cres. 561; 3  
 Man. & Ryl. 9.

(d) 9 Massachusetts' Rep.  
 518.

If a prudent owner, being present, would not have incurred the expense, these owners are not bound, because the master incurred it. There cannot, in such a case as the present, be a ratification by mere delay, for ratification can only be made with full knowledge of all the facts. *Story* on Agency (a), citing *Horsfull v. Fauntleroy* (b), and *Owens v. Hulme* (c). The opinion of Mr. Justice Ashhurst in *Mitchell v. Edie* (d), is to the same effect, and *Gernon v. The Royal Exchange Assurance* (e), adopts the same principle. Where a ship ceases to be a navigable ship, the master ceases to be the agent for the owners, and becomes agent for all concerned, and the owners are not bound by his acts, unless they were present. Here the owners knew nothing of the facts till after the repairs had been executed, and could no more have prevented them than could the underwriters themselves.

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The *Lord Advocate* and Mr. *J. Leycester Adolphus* (Mr. *Peacock* was with them) for the respondents.—The first two questions here are, whether notice of abandonment was necessary, and whether the notice here given was given in due time; and it is not pretended that the appellants can answer the second question in the affirmative. The notice of abandonment was too late, much to the injury of the respondents. The facts shew that the finding of the jury on what constituted the third question is correct, and that the appellants did really treat this as a case of mere average loss.

As to the first question; The other side is not warranted by any authority in confining the necessity of abandonment to cases of barratry and capture. The question whether a vessel is lost if it is not actually sunk, must depend on various circumstances. But if the owners take

(a) Page, 205, s. 243.

(b) 10 Barn. & Cr. 755.

(c) 9 Peter's Rep. 607, 629.

(d) 1 Term Rep. 612.

(e) 6 Taunt., 383.

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these circumstances into consideration, and incur the expence of repair, they are not at liberty afterwards to abandon the ship. To say that they are so would be to allow them great advantages, such as, in fairness, they ought not to enjoy. At all events they cannot be entitled to abandon and treat the case as one of total loss, after having made the experiment of treating it as a case of average loss. They cannot, when in fact the ship still exists, make voyages with a view to profit, and then, finding that the vessel will not sell for the amount they have expended upon it, abandon it to the underwriters, as if actually and totally lost. If they intend to abandon, they must give notice of that intention, and give it at the earliest possible period after the injury which they allege to be the cause of the loss. Such is the effect of the various decisions on this subject. The case of *Mitchell v. Edie* (a) is an instance; Mr. Justice Buller there directed the jury that the capture of the vessel gave the owners an option to abandon or not; but if they chose to abandon they must do it immediately upon receiving intelligence of the loss, and not having so given notice, they had waived their right, and could only recover for an average loss. The Court adopted this view of the law, and declared that the master could not be considered the agent of the underwriters till notice had been given to them, and they had had an opportunity of exercising a discretion as to his acts. The case of *Cambridge v. Anderton* (b) does not impeach that doctrine, for there the master being unable to get the vessel off the rocks, and to repair it, sold it to some people residing on the spot, and they having at their command means which he could not procure, released the ship, repaired it, and sent it on a voyage. No notice of abandonment was required there, because the ship was in fact, as the jury found, totally lost. The master could not there be said to have

(a) 1 Term. Rep. 608.

(b) 2 Barn. & Cr. 691.

had the opportunity of exercising any choice as to the course he would pursue. In the first place, it was supposed to be impossible to recover the ship ; in the next, it was clear that the cost of any attempt to recover and repair it would far exceed its value.

[Lord Campbell.—There, and in *Roux v. Salvador*, there has been an actual sale of the ship. Here no sale has taken place. Those cases are, therefore, different from the present.]

The question here is, whether the act of the master is, or not, to bind the owners. It is clear that in this case they were bound by his acts. He was acting, as his letters shew, exclusively for them. They had insured the freight of the vessel on this very voyage on which he took the vessel, after making the repairs. In such a case there can be no doubt that notice of abandonment is necessary. Till this case arose, no text writer would have expressed any doubt upon it. In *Smith's Compendium of Mercantile Law*, it is said (a) : "Total loss is of two sorts : it is either total *per se*, or that which may be rendered so by abandonment." *Hughes on Insurance* says the same thing (b). A total loss occurs either when the property insured is totally lost to the owner, or when, though not in fact wholly lost, the damage sustained is of such a nature that the owner is entitled to recover to the amount of the insurance, on making an abandonment. The use of an abandonment, in such cases, is to enable the underwriters to take measures for the preservation of the property, and to exclude any inference that the insured still intend to adhere to it as their own."

The law clearly recognises a distinction between the cases of an actual and a constructive total loss : the distinction is not confined to instances in which the ship exists in such a shape that it may be restored to the owner, and at once employed in continuing the voyage. The

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(a) Page 348.

(b) Page 381.



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cases of *Irving v. Manning* (a), and *Allen v. Sugrue* (b), have no bearing upon the present as to this point. The first merely decided that actual and constructive loss were the same things with respect to a valued and an open policy. In the other the question of abandonment was never raised. In *Cambridge v. Anderton* (c), it was held that no notice of abandonment was necessary, but then the description of the circumstances which dispensed with such a notice was given by Lord *Tenterden*, when he spoke of the vessel as "a congeries of planks."

[Lord *Campbell*.—That expression is very perplexing. What does it mean?—It cannot mean to confine the right to recover as for a total loss to cases where the very form of the ship is destroyed, for it is plain that the price of labor, the means of getting money, and various other circumstances, may give the right so to recover, even in cases where the ship has been repaired and has arrived at the port of destination.]

It confines the right so to recover, without first giving notice of abandonment, to cases where the ship has been destroyed as a ship, and is a mere congeries of planks. The cases of *Dyson v. Rowcroft* (d), *Roux v. Salvador* (e), and *Cologan v. The London Assurance Company* (f), are all to the same effect, the reason being that where the very form of the ship is destroyed, the underwriter cannot be better or worse for the abandonment; but that shews that where it is not so destroyed, he is entitled to notice of abandonment. *Hamilton v. Mendes* (g), *Martin v. Crockatt* (h), *Irving v. Manning* in the Court of Common Pleas (i), *Bell v. Nixon* (k), *Young v. The*

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| (a) <i>Ante</i> , 287.                       | (f) 5 M. & S. 447.                  |
| (b) 8 Barn. & Cr. 561; 3<br>Man. & Ryl. 9.   | (g) 1 Wm. Bl. 276; 2 Barr.<br>1198. |
| (c) 2 B. & Cres. 691.                        | (h) 14 East, 465.                   |
| (d) 3 Bos. & P. 474.                         | (i) 1 Com. Bench, 168.              |
| (e) 1 Bing. N. C. 526; 3<br>Bing. N. C. 266. | (k) 1 Holt, 423.                    |

ring (a), all tend to the same point, and shew the marked distinction which exists between an actual and a constructive total loss, and that notice of abandonment is necessarily incident to the latter class of cases.

There is a considerable difference between abandonment and voluntary relinquishment.

[*Lord Campbell*.—That is a new term in the law of insurance. *Lord Brougham*.—It is used for cession.]

Abandonment has the effect of election. In *Cologan v. The London Assurance Company* (b), Mr. Justice *Abbott* says, "Abandonment excludes any presumption which might have arisen from the silence of the assured, that they still meant to adhere to the adventure as their own." That gives it a character quite different from that of relinquishment. The choice of electing to abandon may depend on many circumstances with which the underwriter is not acquainted. It is necessary to vest in the underwriters a title to the thing which is abandoned. If not required to be made at a particular time, and if treated as a mere consequence of the existence of particular circumstances, innumerable disputes would arise as to the time when the property was divested from its original owners, and vested in the underwriters. The cases which show abandonment to be necessary are numerous; *Tunno v. Edwards* (c) laid down the doctrine distinctly, that wherever the thing insured subsists in specie, and there is a chance of its recovery, there must be an abandonment. And wherever this doctrine has been held, no distinction has been made between the case of capture and sea damage. It is true that the judgment of the Court of Common Pleas in the case of *Roux v. Salvador* was overruled by the Exchequer Chamber; but it was not upon the point as to the abandonment, but upon the facts as to which alone the two courts differed in opinion. The

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(a) 2 Man. & Gr. 593; 2  
Scott, N. R. 752.

(b) 5 M. & S. 456.  
(c) 12 East, 488.

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expressions used by Lord *Abinger* in that case (a), as to what the assured is to do while the thing insured exists in specie, and there is a chance that it may be recovered, probably gave rise to the present litigation. But Lord *Abinger* certainly misapprehended the intention of Lord *Ellenborough* in the observations made by the latter in *Mellish v. Andrews* (b); for they were confined to the particular case then before the court, in which there had been a total loss in fact. His Lordship intended to lay down the doctrine that where the thing existed in specie, there must be an abandonment; for otherwise the owner would be taking the chance of recovering it, and then he could only sue as for a partial loss. Nothing that was said in *Roux v. Salvador* really controverts this position, for there the Court of Error was of opinion that the hides were totally lost in fact. Nor do the text-books published since the case of *Roux v. Salvador* in error, adopt the rule, supposed to be established in that case, that abandonment is equally unnecessary in the case of a constructive and of an actual total loss.

It has been said that the property vested in the underwriter on the ship receiving its death wound, but Lord *Mansfield*, in *Hamilton v. Mendes* (c), expressly repudiated such a doctrine, and declared that no rights vested in the owner to claim as for a total loss, until he had made his election by abandonment. Of course, therefore, no right to the property could vest in the underwriter until the owner had made that election. Here it is clear that the ship did exist in specie, and that the doctrine of Lord *Mansfield* directly applies to this case.

Then supposing the owner bound to give notice, has he done it in due time? And supposing him bound to make his election, has he not made it by his mode of dealing with the ship, so as to prevent him from recovering as for

(a) 3 Bing. N. C. 286, 287. (c) 2 Burr. 1211.

(b) 15 East, 13.

a total loss? The argument that the underwriters would not have been bettered by receiving an earlier notice, cannot be admitted. The parties bound to give notice have no right to consider what may be the value of such a notice, at one time or another. They must give the notice as soon as possible after the event which they intend to make the groundwork of their claim.

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The *Attorney General* in reply.—It is clear that for all purposes a constructive and an actual total loss are identical. *Manning v. Irving* must be taken to have decided that principle. “Constructive total loss” is in truth an inaccurate expression.

[*Lord Campbell*.—An action on a policy may be brought at any time within the period fixed by the Statute of Limitations. Now suppose this vessel had met with an accident in the *Thames*, the owners and the insurers living in *London*; suppose it to be a question whether the vessel could be advantageously repaired or not, and the underwriters to receive no intimation for three years; at the end of that time might the assured come on them for a total loss?]

The question proceeds on the mistake of confounding abandonment itself with notice of abandonment. Notice of abandonment is not necessary in all cases; *Cambridge v. Anderton*, *Roux v. Salvador*. In the case supposed, if it turned out that the vessel was not worth repair, notice would not be necessary. In the cases of capture and embargo, notice may be necessary; but these cases differ from those of injury occasioned by perils of the sea. In the case of *The General Insurance Company v. Ruggles (a)*, the court talked of abandonment, though there the vessel was in fact at the bottom of the sea, and no question about notice of abandonment could possibly arise.

(a) 12 Wheaton's Rep. 408.

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The case of *Chapman v. Benson* (a) is in principle an authority for the appellants, and the acts of the master being considered to be acts done either for the under-writers, because he became their agent by the injury happening to the ship, and by the voyage being thereby retarded, or for all parties concerned, cannot be brought forward in answer to the claim of the owners. The case of *Douglas v. Moody* (b) shows that wherever the voyage is interrupted "by capture or prize, or by other detentions and casualties," the master becomes the agent of all concerned; and nobody in particular is bound by his acts, but the value of them is to be ascertained by circumstances. That principle is deducible from all the English authorities, and must be applied here.

Supposing then that notice of abandonment was necessary, it was here given in due time, and nothing that the master did can be construed as done by an agent of the owners, so as to bar them from their right to recover.

*The Lord Chancellor.*—It appears to me that in this case there are special grounds shown upon the correspondence, which are sufficient to dispose of the questions, without entering into any discussion as to many of the points which have been raised at the bar, particularly as to that question which has arisen with respect to the formal notice of abandonment, about which there is a confusion existing, arising, as I believe, more from the misuse of terms than from any real difference in the cases. But at all events, in this case it is admitted on all hands, whether the parties were bound to give a formal notice of abandonment or not, that when the facts came to their knowledge in this country, they were sufficiently informed of

(a) 7 Scott's N. R. 625; 6 in this House.  
 6 Man. & Gr. 792. In this (b) 9 Massachusetts's Rep.  
 case a writ of error is pending 518.

what had taken place to enable them, if they thought proper, to take upon themselves the chance of the benefit of retaining the ownership of the property, instead of taking the sum which was secured to them by the policy effected with the underwriters upon the vessel; and if they acted upon that opportunity of election, they surely cannot afterwards turn round and go against the underwriters as for a total loss. If there was any necessity for a formal abandonment, and with a full knowledge of the facts they did not make that formal abandonment, but took the property instead, they could not afterwards take the benefit of the policy, as if there had been a formal abandonment. If, on the other hand, there was no necessity for a formal abandonment, still, if they chose to lie by and allow things to go on as they did, they could not afterwards, upon a change of circumstances, or in consequence of a better calculation, turn round and say to the underwriters, "Now we will give you up this property, because we find we cannot turn it to the advantage which we expected." The question really turns upon what the information was which was sent to them, as to the occurrences that had taken place abroad, and what their conduct was upon that information coming to them. Now the first communication they had, may perhaps not have been sufficient to enable them to come to any conclusion; they knew that misfortune had occurred to the vessel, and they knew that expenses had been incurred in respect of repairing the vessel; but they did not know to what extent. But there is a letter which they received afterwards, which seems to me to decide the question. That letter is written by *Hunter, Arbuthnot, and Company*, at the *Mauritius*, and it is dated the 16th of *July*, 1842, and was received in this country on the 13th *November*. In that letter it is stated that "Captain *Elder* is naturally anxious to follow his instructions, and proceed, when the ship is repaired, to *Bombay*; for this purpose he has advertised for the loan of about 20,000

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dollars, to be secured by a bottomry bond on the ship, which would proceed to *Bombay* in the prosecution of the voyage. No offers, however, were made on these terms, but parties are ready to advance the money required, provided the ship proceeds to *England* direct from this. Captain *Elder* will therefore be obliged to deviate from his instructions, and we have offered him a cargo of sugar at the first season for *England*, at the current rate of freight, which we think better for all parties than to go to *Bombay* at the miserably low rate of freight ruling in *India*." That letter therefore shows that the parties were under the necessity of borrowing upon the ship a sum equal to 20,000 dollars. That letter they received on the 13th of *November*; and by a letter of their own, dated the 3rd of *December*, 1842, they acknowledge the receipt of the various letters containing the information as to what extent the expenses at the *Mauritius* would be carried. Knowing therefore the extent to which the expenses were likely to be carried, they write acknowledging the receipt of these letters, and then they express themselves in these terms:—"We observe the general measures adopted for the representatives of the ship *William Nicol*, which we hope may turn out to have been the best in the unfortunate circumstances in which she was placed; but in the absence of any past experience on our part of the usages of your port in such cases, we were rather startled at the apparent necessity of a bottomry bond being had recourse to; but this may be a misapprehension on our part which the communication of particulars hereafter may clear up."

There is no doubt that they were in possession of all the information necessary to enable them to decide as to the course they would take. In point of fact the answer to that particular letter shews that they were in possession of the information, stating that 20,000 dollars had been borrowed on a bottomry bond for the expence of the repairs, and were well aware that the continuance of the

voyage, for any purposes of profit, must be a doubtful speculation.

When we consider that these parties on the 13th of *November* had possession of this information, and we find them answering in the terms I have already noticed, and afterwards, on the 7th of *March*, writing to Messrs. *R. and J. Anderson, London*, in the terms I am about to read, there can be no doubt that they possessed all the knowledge necessary for them to determine whether they would or would not abandon the vessel. They write thus:—

“ From the advices last received by us from the agents of the ship *William Nicoll*, at *Mauritius*, it was expected that she would be ready to leave that place with a cargo of sugar for *London*, about the 20th *December*; and as she may, therefore, be looked for shortly, we enclose a few lines for Captain *Elder*, requesting him to follow your directions as to the dock of his discharge, to which please attend, after fixing with Mr. *J. D. Nicol* what dock it will be most advisable to send him to for that purpose.”

Whether the fact of a total loss, as it is called, or such damage as would exceed the value of the ship to repair, was incurred, would, or would not, make the captain the agent of the underwriters, or the agent for all the parties, is a matter which I do not think it necessary at present to advert to, because it is quite clear, even if it was so, that it was quite competent for the owners to continue the employment of the captain. If they thought proper to say, “ we do not treat this as a total loss; we do not treat you as the general agent in this matter, but we treat you as the person having our authority over this property:” and if the facts had sufficiently come to their knowledge of what he was doing, and notwithstanding that, they think proper to take the property under their own direction, and to recognize his acts, can they afterwards, when a considerable time has elapsed, and the vessel has made a different voyage, and obtained different freight from what they expected,

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turn round and say,—“ We no longer consider this property as ours, but we will go against the underwriters as for a total loss ?” It appears to me to be not only contrary to the common principles of justice, but also contrary to all the authorities which have been referred to, that they should do so. Nothing has been cited at the bar which can alter that view of the case, because when it is said that they had not the necessary information to enable them to come to the conclusion of whether they would treat it as a total loss or not, and when it is said that they were not aware of what species of vessel it would become in consequence of the repairs to be done, so as to enable them to elect, still, if they thought proper to employ the captain as their agent in causing the repairs to be done, whether he acted judiciously or not, it is for them to suffer the loss, and any want of judgment in their agent, they must take the consequence of, and it is not to be visited upon the underwriters. Upon these grounds, my Lords, it appears to me that the judgment of the Court below must be affirmed.

Lord *Brougham* fully concurred, and thought that the judgment should be affirmed with costs.

Lord *Campbell*.—I think that the judgment of the Court below should be affirmed on both the grounds on which that Court proceeded, namely, “ in respect that the pursuers were bound and failed to abandon in due time,” and also that “ they treated the loss as partial.”

A constructive total loss is a good ground for abandoning, but in deciding on the circumstances which constitute a constructive total loss, which is as good a term as a contingent total loss, the reasons which govern the conduct of prudent uninsured owners must be considered. If a prudent person, uninsured, would not have repaired the vessel, but would have sold it to be broken up, that

amounts to a total loss. Then the question arises what the assured is bound to do under such circumstances, in order to entitle himself to claim as for a total loss. The ship was not submerged or destroyed; it remained in the form of a ship, capable of being repaired, and it was for the captain to determine whether it should be repaired or not. Whether it should be repaired or not depended on the price of labor, the cost of materials, the rate at which money could be borrowed, and on the probable profits to be obtained from the employment of the ship after such repairs should have been executed. Under these circumstances the question arises, whether, when the owners of a ship so insured receive intelligence that the ship is capable of being repaired, and that it is lying in port, they can claim as for a total loss, without giving notice of abandonment? My opinion is that they cannot do so. According to all the old authorities, a constructive total loss can only entitle the owners to recover as for an actual total loss, by a notice of abandonment, for though, in the judgment of the assured, it may be better not to repair the vessel, the underwriters may, with different means, give directions to repair, or may direct, and are entitled to direct, how the wreck is to be disposed of. It would be an extreme hardship for them to be called on to pay as for a total loss, without having the opportunity of making the most of the ship in its disabled state. The law, therefore, requires that notice shall be given in order to convert a constructive into an absolute total loss.

Then we come to the cases of *Cambridge v. Anderton*, and *Roux v. Salvador*. The Court of King's Bench held, in *Cambridge v. Anderton*, without overturning the old authorities, that in the peculiar circumstances of that case, a notice of abandonment was not necessary. But why? Because, coming down the *St. Lawrence*, the ship met with a serious misfortune, and the captain, after having taken the best advice, thinking it not worth repairing, sold

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it at once, and conveyed a good title to the purchaser. The owners received intelligence of that sale at the same moment that they learned the injury which had happened to the vessel. In such circumstances there was nothing to abandon. The ship was gone; the underwriters could not have taken possession of it, for it was lawfully transferred to the purchasers.

Then comes the case of *Roux v. Salvador*, in which Lord Chief Justice *Tindal* held that notice of abandonment was necessary. There the hides were so injured that they ceased to exist as hides before reaching the port of destination; so that though the substance of something remained, the substance of what had been insured was destroyed. But here the ship existed, was repaired, and brought home a cargo to *England*. When the assured heard, in *November*, the facts of the case, it was imperative on them, if they meant to turn a partial into a total loss, to give notice of abandonment, so that the underwriters should have the opportunity of dealing as they pleased with the property.

Was there any notice of abandonment? There was; but not till the 30th *March*, 1843. The ship had returned on the 27th of *March*, and, at that time, the assured were fully aware of all the facts of the case.

Under all these circumstances, I think that the first ground alone would have been sufficient for the judgment.

As to the second ground, that here the assured had elected, I think that equally conclusive against them. Not only had they not given notice to abandon, but they had taken steps by which they chose to appear as treating this property as still belonging to them. They did that which amounted to an intimation of their intention of coming upon the underwriters for a partial loss, and taking all the advantage which might arise from the employment of the ship.

It is not necessary to give any opinion as to the general

power of the master under such circumstances as exist in this case ; but I must hear a great deal of argument before I determine that where he acts *bonâ fide* for the advantage of the owners, he has not authority, by so doing, to bind them. In this case he thought he was doing the best for the interests of those who employed him : he thought he was doing the best for all parties concerned ; but he was still the agent of the owners, and it would be dangerous to say that his authority, as their agent, might be questioned, and contradicted, by afterwards shewing that in fact what he did would not be for their interests.

In this case his authority was adopted in this country ; for in the month of *November* 1842, the owners knew that he was repairing the ship, and on their account, and was to freight it from the *Mauritius* home, and that they were to have the profits arising from such freight. Are they to be allowed, after this, to revoke his authority ?—No ; they have acquiesced in all that he has done as conformable to his authority, or if he did not already possess that authority, they created it by their adoption of his acts. They treated this loss as a partial loss till the 30th of *March*, 1843, and after that they cannot be allowed, for the first time, to adopt another line of conduct, and to treat it as a total loss.

Interlocutor of the Court below affirmed with costs.

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| 1846,<br>June 16.                 | JOHN WRIGHT HENNIKER WILSON, Esq.                                | <i>Appellant.</i>     |
| 1847, -<br>Feb. 9, 11,<br>15, 16. | MARY WRIGHT HENNIKER WILSON (the<br>Appellant's Wife) and others | } <i>Respondents.</i> |
| 1848,<br>May 23.                  |                                                                  |                       |

*Husband and wife. Articles of separation. Specific performance. Jurisdiction.*

THE Court of Chancery exercises only its ordinary jurisdiction in giving effect to articles of separation between husband and wife, so far as they regard an arrangement of property agreed upon.

The Court, in decreeing specific performance of such articles, does not inquire into the cause of the separation.

The stopping of a suit in the Ecclesiastical Court for nullity of marriage, on the ground of impotency of the husband, is a sufficient consideration to him for articles of separation; and so, it seems, is a covenant by a third party to pay his debts.

*Semble*, that the Court, after decreeing specific performance of the articles, may restrain the wife, as well as the husband, from proceeding in the suit for nullity. (*Infra*, pp. 556, 575.)

THIS was an appeal against a decree for specific performance of articles of separation between the appellant and his wife, the respondent. They were married in *April* 1839. Differences arose between them soon after the marriage, and continued until *May* 1843, when Mrs. *Wilson*, by advice of her friends, went to reside at the house of Mr. *Foster*, her solicitor. On the 8th of that month the appellant was served with a citation from the Consistory Court of *London*, in a suit for nullity of marriage by reason of impotency. The appellant called next day on Mr. *Foster*, expressed his anxiety to stop the suit, and to enter into an amicable arrangement for a separation; and proposed to execute a proper deed for that purpose, and to give up the interests which he took in his wife's property under their marriage settlement, and in virtue of his marital rights, in consideration of an annuity of 1500*l*.

By the settlement executed previous to the marriage,

a freehold estate in the county of *Southampton*, called *Drayton Lodge*, of the value of 2000*l.* a-year, to which Mrs. *Wilson* was entitled for her life, for her separate use, with remainder to her issue, under the will of Lady *Frances Wilson*, was secured to the same use, together with 3000*l.* consols, part of her own funds; and a leasehold house and premises, called the *Chelsea Park* estate, which, with the land tax charged thereon, she had purchased some time before the marriage, were settled to the use of the appellant during their joint lives, and to her, for her life, if she survived him, with remainder of the term absolutely to the appellant, his executors and assigns. The rest of the respondent's property—consisting of freehold estates in the counties of *York* and *Essex*, worth together about 3000*l.* a-year, devised to her by Sir *Henry Wilson*, for her life, with remainder to her issue, with other remainders over; of a leasehold house in *Grosvenor Place*, in the county of *Middlesex*, bequeathed to her by the same will, and also of considerable sums of money in the public funds, in Bank and on mortgage, and other personal estate of large amount,—was not included in the settlement, and therefore, after the solemnization of the marriage, belonged, as the settlement recited, to the appellant in his marital right (*see* 14 Simons, 405).

The appellant was informed, on the 13th of *May*, that the terms of separation which he proposed to Mr. *Foster* would not be accepted, and that it was determined by Mrs. *Wilson* and her advisers to proceed with the suit in the Consistory Court. A notice to that effect was sent on the 25th of *May* to the appellant, who, on the next day, called again on Mr. *Foster*, and was informed that the libel in that suit would be filed on the 2d of *June* then next ensuing, unless an arrangement was completed in the mean time. The appellant on the 26th of *May* again called on Mr. *Foster*, and with a view of preventing the suit, and the consequent publicity of the charge therein made, proposed

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(without prejudice) “to bind himself to enter into a deed of separation to be executed immediately, whereby Mrs. *Wilson* should be secured in the undisturbed enjoyment of *Chelsea Park*, with the furniture there, and at *Drayton* also; Mrs. *W.* to receive the rents of the adjacent property at *Chelsea*, paying the ground rents; the rents of the property in *Yorkshire* and *Essex* to be placed under the control of Mrs. *W.*, there being reserved to Mr. *Wilson* a certain sum annually, which he would prefer hearing suggested by Mrs. *Wilson* or her advisers. In considering this amount, it should be recollected that Mr. *W.* had, in pursuance of the agreement made before marriage, effected policies of insurance requiring annual payments to the amount of 600*l.*” This memorandum was dated *May* 26, 1843, and signed by Mr. *W. H. Wilson*.

Mr. *Foster* having submitted this proposal to Mrs. *Wilson* and her advisers, by their direction offered the appellant 1000*l.* a-year out of the property, on his entering into a deed to carry the proposal into effect. The appellant required 1200*l.* a-year, but finding after several discussions with Mr. *Foster*, on the 30th and 31st of *May*, that unless he accepted the annuity of 1000*l.*, the suit in the Consistory Court should proceed, he submitted to the terms proposed, and wrote and signed this memorandum: “The annual sum agreed upon on the part of Mrs. *W. H. Wilson*, to be paid to Mr. *W. H. Wilson* under the deed of separation, to be executed immediately, is 1000*l.* The deed made to carry into effect the terms proposed in a memorandum dated the 26th of *May*, 1843, signed by Mr. *H. Wilson*, and to be a bar to suits; suit now pending to be withdrawn on the mutual execution of the agreement.”

Articles of agreement for separation were immediately prepared, and the appellant—having before refused to appoint a solicitor, as being himself a barrister, and competent to conduct the negotiation—perused the draft and sug-

gested alterations in it, and perused it again after it was finally settled on behalf of the respondent, and he assisted also in examining the engrossment.

The articles so prepared, dated the 1st of *June*, 1843, and made between the appellant of the first part, the respondent, his wife, of the second part, and *Nathan Wetherell*, Esq., of *Lincoln's Inn*, and the said Mr. *Foster*, of the third part—after reciting that, unhappy differences having arisen between the appellant and his wife, they had agreed to live separate, and to enter into the arrangements after mentioned—witnessed that the appellant on the one part, and the said *N. Wetherell* and *W. C. Foster* on the other part, with the privity and approbation of Mrs. *Wilson*, mutually covenanted and agreed to the effect following:—

*First*, That the appellant should at all times thereafter permit Mrs. *Wilson* to live separate and apart from him, &c.

*Secondly*, That the *Chelsea Park* estate, and the land tax thereon, comprised in the marriage settlement of Mr. and Mrs. *Wilson*, and thereby settled as before stated, and all such other estates (if any) as might be purchased or taken in exchange under the provisions thereof, should, from and after the 24th of *June*, 1843, be held by the trustees of the said settlement, in trust for Mrs. *Wilson*, for her separate use during the joint lives of herself and the appellant, to the intent that his life interest in the premises during the life of Mrs. *Wilson* might be superseded; but nevertheless without prejudice to his ultimate interests in the said premises expectant upon her decease.

*Thirdly*, That the estate in the county of *Southampton*, devised by Lady *F. Wilson*, and also the sum of 3000*l.* consols, comprised in the marriage settlement, should remain subject to the trusts thereof.

*Fourthly*, That all other freehold, copyhold, and leasehold estates, to which Mrs. *Wilson* was, at the time of her marriage, or since become, entitled under the wills of

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Sir *Henry* and Lady *Wilson*, should after the said 24th of *June*, subject, as to such of these estates as were situate in the county of *York*, to the annuity of 1000*l.* after mentioned, be conveyed by the appellant to the trustees of the settlement, for the separate use of Mrs. *Wilson*, for the joint lives of her and the appellant.

*Fifthly*, That all the furniture in the mansion at *Chelsea Park*, should be held and enjoyed by Mrs. *Wilson* during her life, for her separate use, and after her decease should belong to the appellant, his executors, &c.; and that all other goods and effects in the said mansion (except books belonging to the appellant) and all additions to be made thereto, and to the furniture, and all furniture, goods, and effects, in the mansion at *Drayton Lodge*, and all jewels, ornaments, wearing apparel, &c., belonging to Mrs. *Wilson*, and also all real and personal estate afterwards acquired by her, should belong absolutely to her for her separate use, with power to dispose of the same by deed, or will, &c.

*Sixthly*, That all rents, taxes, and other outgoings in respect of the *Chelsea Park* estate, and all expences of repairs upon the same, should be paid by the appellant up to the same 24th of *June*.

*Seventhly*.—That, if and so long as the appellant should duly observe and perform the said covenants and agreements, all the rents, taxes, and other outgoings in respect of the said several estates, and all expences of repairs upon the same, should, after the 24th of *June*, be paid by Mrs. *Wilson* during her life, and “that he, the said *John Wright Henniker Wilson*, his heirs, executors, and administrators, and his and their estates and effects, should be indemnified therefrom, and from all the present debts and liabilities of the said *John Wright Henniker Wilson*, by the joint and several covenant of the said *N. Wetherell* and *W. C Foster*.”

*Eighthly*, That, if and so long as the appellant should

duly observe and perform the covenants and agreements herein contained, a clear annuity of 1,000*l.*, commencing from the 24th of *June*, should be paid to him by equal half-yearly portions, during the joint lives of himself and Mrs. *Wilson*, the said annuity to be charged on the freehold estates in the county of *York*, which belonged to Mrs. *Wilson* before her marriage.

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*Ninthly*, That a proper deed or deeds for effectuating the objects of the articles should, with all convenient speed, be executed by all the parties to these presents, "such deed or deeds containing all such covenants and provisions as should be deemed expedient," to be settled on behalf of all parties by counsel; and that in case of any unnecessary delay in the execution of such deed or deeds by any of the parties, the other of them should be at liberty to make void these presents.

And *lastly*, that, upon the execution of these presents by the appellant, the proceedings instituted against him in the Ecclesiastical Court by Mrs. *Wilson*, should be suspended, and upon the execution of the deed or deeds to be so prepared as aforesaid, should be put an end to and withdrawn, but nevertheless without prejudice to Mrs. *Wilson's* right to institute any other proceedings against him, in case he should make default in the performance of any of these covenants and agreements.

These articles were executed by all the parties to them, and the proceedings in the suit, in the Consistory Court, were suspended.

The appellant having, at first, interposed some delay in quitting *Chelsea Park*, in compliance with the articles, soon afterwards, in the course of a correspondence with Mr. *Foster*, objected to them altogether, on various grounds hereinafter mentioned.

In *August* 1843, Mrs. *Wilson*, by her next friend, and Messrs. *Wetherell* and *Foster*, filed their bill against the appellant, stating, among other things, that they, with the view

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of carrying the said articles into effect, had caused a proper deed to be prepared as thereby provided; that a clerical error occurred in the copying of the original draft of the 7th article, which mentioned that the appellant should be indemnified against his own debts instead of his wife's, as was intended, and that they caused to be substituted in the said deed the usual covenant for indemnifying the appellant against the debts and liabilities of his wife. The bill prayed that, subject to the correction of the said error, the appellant might be decreed to execute the deed so prepared for carrying the articles into effect, according to their true intent and meaning.

The appellant, in his answer, stated the various grounds on which he objected to perform the articles: that they were procured from him by intimidation, duress, and surprise; that he agreed to them from an apprehension of degradation and ridicule, by the exhibition against him of a charge of impotency, which was false, as Mrs. *Wilson* well knew; that in making the proposals of the 26th and 31st of *May*, and in executing the articles, he acted not only without due advice, but also under mental incapacity to contract, arising from apprehension of publicity being given to the said calumnious charge, and that Mrs. *Wilson* and her advisers instituted the suit in the Ecclesiastical Court, and took advantage of his alarm and apprehension, to coerce him into the arrangement; that her sole object was to obtain from him some concessions of property which he acquired under the marriage articles, or his marital rights, for which purpose she had previously threatened him with a divorce upon equally false charges of adultery and cruelty; and the suit for nullity of the marriage by reason of impotency, was another contrivance and device resorted to by her for the same purpose, without any belief in the imputation. He also insisted that the articles differed materially, to his prejudice, from his said proposals, and the draft deed prepared for his execution by the respon-

dents, was itself a deviation from the articles, which did not contain any such clerical error as they alleged; that the suit instituted in the Consistory Court, although suspended, might still be prosecuted by Mrs. *Wilson*, notwithstanding the articles, so that he had no benefit or protection from the articles in that respect: but he repudiated such benefit, and stated that he would compel her to proceed in that suit, so as to give him an opportunity of refuting the false charge of impotency. He submitted that the articles, not being deliberately entered into by him, nor fairly, but fraudulently, obtained from him, were not binding on him; and as the respondents, Messrs. *Whetherell* and *Foster*, did not offer to perform their covenant, to pay his debts, exceeding 6000*l.*, the articles were without any consideration to him, inasmuch as the covenant which they proposed to insert in the deed to indemnify him against Mrs. *Wilson's* debts, was never desired or contemplated by him, knowing, from her habits, and possessed as she was of large property, that she would not incur debts.

The appellant's proctor took a proceeding in the Consistory Court, to compel Mrs. *Wilson* to file her libel there. Her proctor obtained time to do so, and then she and the other respondents filed a supplemental bill in Chancery for an injunction to restrain the appellant from taking further proceedings to compel her to continue the said suit, or to dismiss it; and such injunction was issued, but was discharged upon the appellant's answer being put in.

In *May* 1844, the appellant filed a cross bill, stating the contents of his answers to the original and supplemental bills, and that he had consummated the marriage, and charging that Mrs. *Wilson* admitted his competency, and that her imputation of his impotency would appear to be unfounded if she would proceed to proofs in the suit in the Consistory Court, to

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which he endeavoured to compel her; but she avoided the prosecution thereof, well knowing that she could not succeed therein. The cross bill prayed that the articles might be declared void, and be delivered up to be cancelled.

Mrs. *Wilson* in her answer repeated her denial that the marriage was ever consummated, and added that, to the best of her belief, it was not consummated by reason of the impotency or physical inability of the appellant, owing to some mal-conformation, &c. And she denied that the suit in the Consistory Court was instituted for such purposes as were alleged in the cross bill, but *bonâ fide* to obtain a sentence of nullity of marriage, to which she and her legal advisers, including eminent counsel and civilians, conceived her to be entitled; and she denied that she ever admitted to any person the appellant's competency.

Witnesses were examined in both causes, in the original cause by the respondents only, in the cross cause by both parties, and orders were made that the evidence taken in either cause might be read in the other.

The causes were heard by the Vice Chancellor of *England*, in *January* and *February* 1845, when his Honour rejected certain evidence proposed to be read on behalf of the appellant, to prove the admissions charged in his bill to have been made by Mrs. *Wilson*, to the effect that he was not impotent, and that he had consummated the marriage. His Honour also declared, that, although the covenant, contained in the seventh article, to indemnify the appellant against his own debts, instead of his wife's, was an error committed by the conveyancer's clerk in copying the original draft of the articles, it could not be considered an error as between the appellant and the other parties; and as they had offered to covenant to indemnify him against his wife's debts, his Honour decreed that it be referred to the Master to settle a proper deed of conveyance for carrying into effect the articles of separation, and

that he should insert therein a joint and several covenant by the respondents, Messrs. *Wetherell* and *Foster*, with the appellant, to indemnify him against all debts and liabilities of Mrs. *Wilson* which existed on the 1st of *June* 1843, and all her subsequent and future debts and liabilities. And it was ordered that the appellant should, forthwith, deliver up to Mrs. *Wilson*, for her separate use, possession of the mansion at *Chelsea Park*, and the premises occupied therewith, and also the household furniture and all other goods and effects which were therein, on the 1st of *June* 1843; and it was ordered, that he should set an occupation rent thereon, and charge the appellant with the amount thereof up to the day on which possession thereof should be delivered up. And the master was to inquire by whom the rents of the several estates in the counties of *York* and *Essex*, which had accrued due since *June* 1843, had been received, and to take an account of all such parts thereof as had been received by the appellant, or for his use, and charge him with the amount thereof, after all just allowances; and it was ordered that the master should inquire and ascertain what had become due to the appellant in respect of the annuity of 1000*l.* under the said articles, and that he should set off what he should find due to the appellant on account of the said annuity against what he should find due from him on the other accounts. And it was ordered that an injunction should be awarded to restrain the appellant from receiving any of the rents of the said estates, and also to restrain him, until after execution of the said deed, from taking any proceedings in the suit instituted by Mrs. *Wilson* in the Consistory Court, for the purpose of compelling her to proceed therein, and from applying for any order of the said court for the purpose of dismissing such suit, or otherwise putting an end to it, or whereby the respondents might be made liable for the costs thereof. And it was ordered, that the bill, in the cross cause, be dismissed with costs, and that it be

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referred to the master to tax the costs of the respondents in that and in the original cause up to the hearing ; and that the appellant should pay all such costs when ascertained.

The appeal was against the whole decree.

*Sir Fitzroy Kelly* and *Mr. G. Turner* (*Mr. Busk* and *Mr. Henniker* being with them) for the appellant :

This case presents several points of great importance, never yet decided. The principal question is, whether a Court of Equity, considering the nature and contents of the articles, and the circumstances under which their execution was obtained from the appellant, has jurisdiction, and ought to exercise it, to compel specific performance of them. The appellant states, that soon after the marriage, differences of a trivial nature occurred occasionally between him and *Mrs. Wilson*, chiefly about a natural child he had, and about the apportionment of their household expences. She, conceiving that he had obtained too much of her property by his marital rights, was anxious to re-possess herself of part of it ; and, with that view, she sometimes held out threats of a divorce for adultery and ill usage, charges which were wholly unfounded ; but she never imputed impotency, nor had he ever the slightest intimation of any such charge, until on the 8th of *May* 1843, to his utter astonishment and consternation, he received a citation in a suit for nullity of marriage on that ground. Thrown into a state of alarm and sorrow by so odious a charge, and anxious by any means to avert the threatened calamity, he put himself in communication with his wife's solicitor the next day. The result was, that overpowered by the threat of proceeding immediately with the impending suit, and by the fear and shame of publicity of so disgraceful an imputation, he was induced to enter into the articles of separation.

The articles thus executed, under surprise and misrepre-

sentation, purport to be made between the appellant and wife, and Messrs. *Wetherell* and *Foster*, as trustees for her; they recite that Mr. and Mrs. *Wilson* had agreed to live separate; and the first article stipulates for such separation—which is contrary to the policy of the law and to moral duty: they contain no allegation of adultery or cruelty—which are the only justifiable grounds of separation, being those on which alone the spiritual courts grant divorces, and on which the temporal courts recognize articles of separation as beneficial private arrangements, resorted to for the purpose of avoiding public exposure; they contain no covenant, on the part of the trustees, to protect the husband against the wife's debts,—without which courts of equity have no jurisdiction to enforce the articles. The principal covenants are those by which Mr. *Wilson* gives up the property which he acquired by his marriage. And what is the consideration? Messrs. *Wetherell* and *Foster* covenant to indemnify him against his own debts; but their bill alleges that that is a clerical error, and prays it may be corrected by substituting a covenant to protect him against Mrs. *Wilson's* debts. The appellant never required or contemplated any such protection, knowing that she, with so large a property, and parsimonious habits, would not incur debts. The only consideration, therefore, for the appellant's resigning the enjoyment of at least 3,000*l.* a year, for a life annuity of 1,000*l.*, was the suspension of the suit in the Ecclesiastical Court, which is no consideration at all, because Mrs. *Wilson* may, at any time, proceed with that suit, or institute another, notwithstanding the covenant of her trustees to stop it.

The appellant, finding upon deliberation, after executing the articles, that the only benefit he derived from the sacrifice made by him was a mere temporary rescue from the terror and disgrace of the suit for nullity of the marriage, repented of what he had done in a state of distraction, caused by the horrible imputation—

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[Lord *Brougham*.—Not horrible ; all men become impotent with the infirmities of age.]

[The Lord Chancellor (*a*).—The odium of the imputation would be, that he contracted marriage knowing that he was impotent.]

It is an imputation so horrible as to drive men mad, of which Dr. *Burrowes* has given several instances in his book, and it had the effect on the appellant of rendering him, at the time, incapable of transacting business.

The most eminent Equity Judges disapproved of separation deeds, and expressed their surprise how they came to be recognised by any court. Lord *Rosslyn*, in *Legard v. Johnson* (*b*), says, “The common law will not entertain a suit upon contract by a wife against her husband. The Ecclesiastical Court has exclusive cognizance of the rights and duties arising from the state of marriage. I am completely at a loss to discover an equity to control the common law, and admit a suit between husband and wife on a personal contract, and supersede the jurisdiction of the Ecclesiastical Court, by entering into the consideration of it.” He mentions several cases, in which, he says, “Lord *Nottingham* would not entertain any jurisdiction upon a contract between husband and wife :” And he adds that Lord *Hardwicke*, in *Head v. Head* (*c*), held the same opinion of the defect of jurisdiction in Chancery ; and that the only cases in which that court interfered were those in which a third party bound himself to indemnify the husband against the wife’s debts, as in *Seeling v. Crawley* (*d*), and *Angier v. Angier* (*e*). Lord *Eldon* frequently declared

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| (a) The case was partly heard in 1846, by Lord <i>Lyndhurst</i> , (then Chancellor) Lord <i>Brougham</i> , and Lord <i>Cottenham</i> . It was fully heard in 1847, by Lord <i>Cottenham</i> (then Chancel- | lor) without any law lord.<br>(b) 3 Ves. 359.<br>(c) 3 Atk. 547.<br>(d) 2 Vern. 386.<br>(e) Prec. Chan. 496. ; S. C., Gilb. Eq. Rep. 152. |
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his repugnance to such deeds. In *Lord St. John v. Lady St. John* (a), he expresses strongly his dissent from the *dicta* that fell from judges in cases at law in favor of deeds of separation, which he considers to be contrary to the sacred nature of the contract of marriage, and to the policy of the law, that marriage should be indissoluble, except by the legislature: He further says that there could not be even a separation *à mensâ et thoro* except *propter sævitiam aut adulterium*, and that even where the parties, after such separation, came together again, there would be a complete end of it: And—after referring to deeds of separation, containing covenants by third persons to indemnify the husband against the wife's debts, on which the jurisdiction in equity was said to be founded, and which was exercised, for the first time, in *Guth v. Guth* (b), of which he disapproves, as Lord Rosslyn did in *Legard v. Johnson* (c)—he says “Lord Thurlow doubted whether covenants with such objects ought to be the foundation either of action or specific performance. That doubt has long since had place in my mind. If this were *res integra*, untouched by *dictum* or decision, I would not have permitted such a covenant to be the foundation of an action or a suit in this court. But if *dicta* have followed *dicta*, or decision has followed decision, to the extent of settling the law, I cannot, upon any doubt of mine as to what ought originally to have been the decision, shake what is the settled law upon the subject. It is better that the case should go to the House of Lords than that the law should remain in this state upon a point connected with the very well-being of society.” His Lordship, in the subsequent case of *The Earl of Westmeath v. The Countess of Westmeath* says, (d) “If the question, whether the Courts would, or would not, act

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(a) 11 Ves. 529.

(c) 3 Ves. 361.

(b) 3 Bro. C. C. 614.

(d) Jacob, 135.

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upon articles of this sort, were not prejudiced by any decisions, I should say that I think no Court ought to act on them ;” and after referring to his opinion in *St. John v. St. John*, he says, “ it is quite inexplicable how courts of equity got any jurisdiction with respect to these articles.” As to the covenant by the trustees to indemnify the husband against the wife’s debts, his Lordship says (a)—“ It is impossible to deny that a covenant of this sort is made by parties who are capable of contracting, and it is considered to be sufficient to support the deed against creditors ; but if I am asked how it is possible that objections on ground of public policy can be removed by these covenants, the only answer is that, if not bound by decisions, I should say that it was impossible to shew that it originally ought to have made any difference whether there was or was not such a covenant.” Then saying that he must yield to the judgments of his predecessors, he adds that, from conversations he recollected with Lords *Kenyon* and *Thurlow*, and Lord C. B. *Eyre*, they thought such covenants material, and would not without them enforce articles of separation. In giving his final judgment in the case, he says (b), “ There is not in this case that which in some cases has been held to support these instruments, namely, the valuable consideration of such a covenant” (to indemnify the husband against the wife’s debts). “ The deed having been prepared without it, the defect cannot be supplied by a Court of Equity ; for I think that a Court of Equity could not correct such a deed.”

Sir *William Grant* says, in *Worrall v. Jacob* (c), “ It is now settled that this court will not carry into execution articles of separation between husband and wife. It recognises no power in them to vary the rights and duties growing out of the marriage, or to effect at their pleasure

(a) *Jacob*, p. 138.

(b) *Id.* 141.

(c) 3 *Meriv.* 268.

a partial dissolution of it. It should seem to follow that the Court would not acknowledge the validity of any stipulation that is merely accessory to an agreement for separation. The object of the covenants between the husband and the trustee, is to give efficacy to the agreement between the husband and the wife; and it does seem strange that the auxiliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit and the policy of the law." And after observing that the covenants between the husband and trustee had however been held valid, he repeats and concurs in what Lord *Eldon* said in *St. John v. St. John* :—"If this were *res integra*, untouched by *dictum* or decision, I would not have permitted such a covenant to be the foundation of an action at law, or a suit in Chancery."

Now, as that covenant by a third party for indemnifying the husband against the wife's debts, which was in some of the preceding decisions held sufficient, and in all held to be indispensable, to support separation deeds, does not find a place at all in these articles; and the want of it cannot, as Lord *Eldon* said, be supplied by a Court of Equity; they contain no foundation for an action or suit in equity, and they are all directly within the principles laid down by Lords *Thurlow* and *Rosslyn* and *Eldon*, and by Sir *W. Grant*. The appellant, it is admitted, never desired any such covenant, and now resists the insertion of it in the articles; but he is not therefore precluded from insisting that without it the articles are void.

Reliance may perhaps be placed on the covenant to stop the suit in the Ecclesiastical Court—for which the appellant most anxiously stipulated—as a sufficient consideration for the articles. Can that covenant be enforced? Can the trustees or the Court of Chancery prevent Mrs. *Wilson* from proceeding in that suit? "That," says Lord *Eldon*, in *Westmeath v. Westmeath*, "leads to a most important question, whether deeds of this kind raise

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such an equity between husband and wife as to authorize the Court of Chancery to prevent them from proceeding in the Ecclesiastical Court; for unless it could be carried to that length, I cannot see how they can be supported.”(a) His Lordship having before said (b), “it was a question whether such a covenant would be binding,” and that “none of the cases touched it in decision or in principle.”

Courts of equity, and of law also, most anxiously avoid interference with the Ecclesiastical Courts, whose exclusive province it is to entertain causes matrimonial, and grant separations. All that the temporal courts can do towards upholding separation deeds is, where the parties, in order to avoid the publicity in court of their unhappy differences, come to a private arrangement, to give effect to the arrangement while the separation actually continues. The spiritual courts disregard deeds of separation altogether, as bars to either party's application for divorce, or for restitution of conjugal rights; *Durant v. Durant* (c), *Beeby v. Beeby* (d), *Westmeath v. Westmeath* (e), *Smith v. Smith* (f), *Mortimer v. Mortimer* (g), *Warrender v. Warrender* (h). But neither they, no more than the temporal Courts, sanction any act that would have the effect of preventing a return to cohabitation; on the contrary, they promote and enjoin it, where there does not appear to be adultery or cruelty enough to warrant a separation. And when the husband and wife do return to cohabitation, whether by voluntary reconciliation or by decree for restitution of conjugal rights, there is an end to the separation, and to all the covenants in the deed, and all things are restored to the state in which they were before the separation; *Fletcher v. Fletcher* (i), *St. John v. St.*

(a) Jacob, 139. (b) p. 136. (f) 2 Hagg. Ecc. (Supp.) 44n.  
 (c) 1 Hagg. Ecc. Rep. 760. (g) 2 Hagg. Cons. 318.  
 (d) 1 Hagg. Cons. Rep. 142n. (h) 2 Clark & F. 527 & 61.  
 (e) 2 Hagg. Ecc. (Supp.) 115. (i) 2 Cox, 107.

*John (a), Bateman v. The Countess of Ross (b), Westmeath v. Westmeath (c).* But how can things be restored in the present case, if this decree, compelling the husband to convey property worth from 2000*l.* to 3000*l.* a-year, for the benefit of the wife, be affirmed? Can reconciliation, putting an end to the separation, revest in the appellant that property, after it is conveyed away absolutely by force of this decree? The trustees may, by the wife's direction, have conveyed it away to strangers, before the reconciliation; and if not, the retention of it will operate as a premium to the wife to reject all overtures towards reconciliation.

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[*Lord Chancellor (Lord Lyndhurst).*—It was the wife's property before marriage, and still belongs to her if the marriage is void.]

The wife's allegations in that respect are unfounded, and the greatest injustice is done to the appellant by the injunction, restraining him from putting her to the proof of them.

[*Lord Brougham.*—Does he say in his answer to her bill that the marriage was consummated?]

He has contradicted her allegations by the testimony of four medical gentlemen, whose evidence the Vice Chancellor rejected. The Ecclesiastical Court is the proper tribunal to disprove them, but the injunction prevents him from going there, and if it be continued, that will be, in effect, to decree a perpetual separation.

[*The Lord Chancellor.*—The injunction has a more limited object; it merely restrains Mr. *Wilson* from moving in the pending suit.]

In effect, it enjoins perpetual separation of the parties; because it prevents the husband from putting his wife to the proof of her charges, and from proceeding to negative them; after which he might graft on her libel

(a) 11 Ves. 532 & 537. (c) 2 Hagg. Ecc. (Supp.) 52.  
(b) 1 Dow, 245.

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his suit for restitution of conjugal rights, *Clowes v. Clowes (a.)*

If, independently of the injunction, Mrs. *Wilson* cannot be prevented from proceeding in the pending suit, or instituting any other in the Ecclesiastical Court, the articles, for which the trustees' covenant to put an end to the suit was the sole consideration, are void. The House will, therefore, have to decide the question, whether she can be prevented.

[Lord *Cottenham*.—Is there not jurisdiction in Equity to prevent her, as Mr. *Wilson* has been prevented, by injunction, as consequential on the decree for specific performance? Courts of Equity constantly restrain proceedings in the law courts, without any conflict of jurisdiction, because the injunction affects the parties, and not the Courts.]

In such cases the Equity Courts have a concurrent, or the sole, jurisdiction over the subject-matter, but in causes matrimonial, they have none, and no instance of their interference by injunction can be produced. There are strong observations applicable to this point—and to articles of separation generally—in the case of *Warrender v. Warrender (b)*, in this House. Lord *Brougham* there says, “What is the legal value of this agreement (of separation) in our law? Absolutely none whatever—in any court whatever—for any purpose whatever, save and except one only, the obligation contracted by the husband with trustees to pay certain sums to the wife. In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract; no damages can be recovered for its breach; no specific performance of its articles can be decreed; no court, civil or consistory, can take notice of its existence. It is admitted on all hands that the *consistorial courts never regard a separation, how formal so ever, as of any avail*

(a) 1 Curteis, 145.

(b) 2 Cl. & Fin. 527.

at all against either party." And Lord *Lyndhurst* says(a) —"The strongest articles of separation may be drawn and signed with the acquiescence of the husband and wife, yet he may sue her, and she may sue him, notwithstanding.

One may pledge himself not to claim or institute a suit for conjugal rights, but he cannot be bound by such pledge, for it is against the inherent condition of the married state, as well as against public policy." These observations only confirm the opinion of Mr. Justice *Buller*, sitting for the Lord Chancellor, in *Fletcher v. Fletcher* (b), where he says—"I know of no instance of this court interfering, by way of injunction, to prevent a proceeding of this nature in the ecclesiastical court, and I certainly do not feel myself prepared to make such an instance. When this court has interfered, it has been in aid of the Ecclesiastical Court, and not to restrain its jurisdiction."

If Courts of Equity will not interfere to stay a suit for divorce, or restitution of conjugal rights, will they stay a suit for nullity of marriage? Assuming Mrs. *Wilson's* allegations, that she was defrauded into the state of marriage by an impotent person, to be true, will they compel her to forego the proper legal process to get rid of the false marriage? But, be the allegations true, or be they false, no Court can prevent her from trying to establish them. Then, "what a strange state of circumstances," says Lord *Eldon*, in *St. John v. St. John* (c), "if the husband suing in the Ecclesiastical Courts, the trustees could come to this court to compel him to give up his rights; but if the wife sues, the same equity fails, for it is impossible to say the wife is bound in any degree by a deed of this sort." That very state of circumstances is brought about by the Vice Chancellor's decree, restraining the husband from proceeding in the Ecclesiastical Court, while the wife's express

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(a) 2 Clark & F. 561.

(c) 11 Ves. 533.

(b) 2 Cox, 107.



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covenant not to proceed there, cannot be enforced. There is no reciprocity in that exercise of equity jurisdiction, and it is at variance with the well known principle not to interfere by injunction when it cannot compel mutual and complete performance of a contract; *Gervais v. Edwards* (a), *Kemble v. Kean* (b), *Baldwin v. The Society for Diffusing Useful Knowledge* (c), *Hooper v. Brodrick* (d), *Armiger v. Clarke* (e), *Howell v. George* (f), *Diestricksen v. Cabburn* (g), *Harnett v. Yielding* (gg).

[The learned counsel then proceeded to examine the Vice Chancellor's judgment (h), and the cases there referred to, some of which they had already cited; and as to others, they said that *Hyde v. Price* (i), and *Cooke v. Wiggins* (j), had no application to the present case; that *Guth v. Guth* (k), in which specific performance of articles was decreed, was disapproved of by Lords *Rosslyn* and *Eldon* (as before-mentioned) (l); that *Rodney v. Chambers* (m), disapproved of by Lord *Eldon* in *St. John v. St. John*, was overruled in *Durant v. Titley* (n), and that in *Seeling v. Crawley* (o), *Angier v. Angier* (p), *Stephens v. Olive*, (q) *Hobbs v. Hull* (r), *More v. Freeman* (s), *Bateman v. The Countess of Ross* (t), *Ross v. Willoughby* (u), *Nunn v. Wilsmore* (v), *Elworthy v. Bird* (w), *Logan v. Birkett* (x),

- (a) 2 Dru. & War. 80.
- (b) 6 Sim. 333.
- (c) 9 Sim. 393.
- (d) 11 Sim. 47.
- (e) Bunbury, 111.
- (f) 1 Madd. 1.
- (g) 2 Phil. 52.
- (gg) 2 Sch. & Lef. 549.
- (h) 14 Sim. 414.
- (i) 3 Ves. 437.
- (j) 10 Ves. 191.
- (k) 3 Bro. C. C. 614.
- (l) *Supra*, p. 551.

- (m) 2 East, 283; see 6 East, 252-3, and 2 B. & Cr., 551-2.
- (n) 7 Price, 577.
- (o) 2 Vern. 386.
- (p) 2 Pre. Ch. 496.
- (q) 2 Bro. C. C. 90.
- (r) 1 Co x, 445.
- (s) Bunb. 205.!
- (t) 1 Dow. 235.
- (u) 10 Price, 2.
- (v) 8 T. Rep. 521.
- (w) 2 Sim. & Stu. 372.
- (x) 1 Myl. & K. 220.

*Clough v. Lambert* (a), *Wellesley v. Wellesley* (b), *Frampton v. Frampton* (c), and *Jones v. Waite* (d), the deeds of separation were supported, because either they were founded on compromises of adultery or cruelty, which would warrant a divorce in the Ecclesiastical Court; or they contained covenants by third persons for maintenance of the wife, and indemnity to the husband against her debts, on which covenants the courts acted; or they were deeds executed and complete, and not articles executory—in all which essentials the present case is deficient.]

The third and last ground of objection to the decree is the dismissal of the cross-bill, and rejection of evidence material to the appellant's case. His bill put the fact of consummation of the marriage in issue, and prayed that the articles might be delivered up to be cancelled on the ground of the appellant's assent to them having been procured by duress and intimidation, and the fear of publicity of a degrading though false charge. *Mrs. Wilson*, in her answer, re-asserted the truth of the charge. Captain *Wilson*, her friend, and entitled next in remainder to the estates left to her by his elder brother, Sir *Henry Wilson*, was examined on behalf of the appellant; and he deposed to conversations she had with him after her marriage respecting the character and constitution of the appellant, and in which she spoke of his ardour in the performance of those conjugal duties for which she now swears he was incompetent. She also spoke of a natural child which she knew he was maintaining, and spoke of proceeding against him for adultery and cruelty, but she never, he says, "hinted at or insinuated, in the slightest degree, anything in the nature of or approaching to the charge of incompetency for sexual intercourse." And he says he believed

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(a) 10 Sim. 174.

(c) 4 Beav. 987.

(b) *Id.* 256; and 4 Myl. &  
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(d) 5 Bing. N. C. 351; 9  
Clark & F. 101.

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“that if any serious ground for complaint existed,” he should have been told of it by her.

His evidence, which was clearly admissible upon the issue raised in the cross-suit, and most important to the appellant’s case, was rejected by the Vice Chancellor. His Honour also rejected some documentary evidence, consisting of letters that passed between Mrs. *Wilson* and a Mr. *Smithson*, and made exhibits in this suit—

Mr. *Bethell* for the respondents, objected to any argument on this evidence, as it was not mentioned at all in the decree appealed from; and he referred to the cases of *Cairns v. Raine* (a) in this House, and *M<sup>c</sup>Mahon v. Burchell* (b) before the Lord Chancellor, in both which a similar objection was admitted.

The *Appellant’s Counsel*.—It is not clear that the decree does not refer to the rejection of the evidence: the petition of appeal certainly complains of it. The appellant ought not to be precluded by a technical objection from showing a material error in the decree.

[The *Lord Chancellor* (Lord *Cottenham*).—The objection was sustained in the case in this House, because the evidence was said to have been given *de bene esse*; and in the other case, because it was stated to be entered by consent of the parties, and without prejudice. But suppose a case in which evidence is properly tendered and rejected, or admitted, and the officer in drawing up the decree omits to notice it?]

Mr. *Bethell*.—The mistake may be rectified by application to the registrar before the decree is made up, or to the court. But he would not press the objection.

The *Appellant’s Counsel* (continued).—The letters written by Mrs. *Wilson* to Mr. *Smithson*, a solicitor, and her confidential adviser, and one of the trustees in Sir *Henry Wilson’s* will, contained repinings in respect of the

(a) 12 Cl. & Fin. 835—6.

(b) 2 Phill. 137, *et seq.*

large share of her property acquired by the appellant by the marriage settlement, and in these letters she put questions to him as to whether a Court of Equity would not restore part of it, and hinted at consultations with him and others about proceedings for a divorce for adultery and ill-usage, but never made any allusion to impotency. These letters, as well as Captain *Wilson's* depositions, were applicable evidence to maintain the statement in the appellant's bill, that Mrs. *Wilson*, at and before the issuing the citation in the nullity suit, well knew that he was not impotent, and that she "admitted to several persons the competency of your orator; and although the said Mrs. *W. H. Wilson*, has several times given way to violent feelings, and expressed herself with great anger as to your orator, as well to the said Mr. *Smithson* as to the said Captain *Wilson*, she never made the least insinuation, or the most remote allusion to either of them, of any such complaint against your orator, but has used to each of them expressions implying the contrary." The charge of impotency was this lady's last resource to coerce the appellant into a concession of property, which she was so anxious to obtain that it is hardly credible that she would ever enter into any arrangement if she knew the charge to be true.

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Mr. *Bethell* and Mr. *Lloyd* for the respondents :

The arguments for the appellant have stirred up questions of law which have been long considered as settled. Upon all general principles now established and recognized in numerous decisions, not only of the Courts of law and equity, but also of this House, these articles are not open to any of the objections raised against them. The agreement was not, as alleged, for a future or prospective separation; these parties had lived in a manner separate for a considerable time, though the actual separation is to be dated only from the day on which Mrs. *Wilson* took up her residence at the house of her solicitor, which, how-

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ever, was prior to the execution of the articles. One can easily understand the feelings of delicacy which prevented her from making an earlier disclosure of the appellant's impotency. That charge was the ground of the suit in the Consistory Court, and the articles were founded on a compromise of that suit. The appellant alleges in all his pleadings that the charge is false, but he does not swear that he consummated the marriage; he says in the cross-bill that it was consummated, but Mrs. *Wilson*, in her answer, denies it, in the most solemn and circumstantial manner, and re-asserts the charge of his inability to consummate it.

The appellant sets up various pretences against the validity of the articles, alleging that they were obtained from him by "conspiracy and intimidation;" by "fraud and falsehood" as to the grounds of the suit; by the "influence of fear, and apprehension of publicity, and consequent ridicule and degradation;" by "surprise" and "under mental incapacity to contract, and want of professional advice." All these pretences are groundless, and are mere after-thoughts and fictions, resorted to after execution of the articles, in order to evade the performance of them.

As to the pretence of pressure through surprise and want of advice, Mr. *Foster* wrote to him twice before the citation from the Ecclesiastical Court was served, and afterwards recommended to him to appoint a solicitor, and his answers were that he did not require any, as being himself a barrister fully competent to transact the business. And so it appeared, for he wrote or dictated minutes for the agreement: he perused and reperused the articles, first in draft, afterwards when engrossed, and he suggested several alterations in the draft, some of which were approved of and adopted. He had frequent interviews with Mr. *Foster*, the negotiation having continued for three weeks, during which he showed no signs of alarm or intimidation. At the first interview, he said the case "must

ultimately come to a separation," and he proposed an amicable arrangement by an annuity of 1500*l.*, but finding a determination on the part of Mrs. *Wilson* not to yield to ~~that~~ demand, he, after consulting a proctor, as he said, reduced it to 1200*l.*, and finally assented to the annuity of 1000*l.*, as first proposed by her advisers. The proposal to come to a private arrangement, instead of proceeding in the suit, originated with himself, and he had abundant time and opportunity to confer with solicitors and counsel, and negotiate the compromise of the suit through them; he sometimes used expressions implying that he was in consultation with friends and advisers. That he acted with deliberation and in the free exercise of his judgment throughout the negotiation, and with full and perfect knowledge of the provisions of the articles, appears clearly and conclusively from his letters and other documents contained in the evidence, as well as from Mr. *Foster's* depositions. If any one had cause to complain of intimidation, it was Mrs. *Wilson*, to whom the appellant sent letters and other writings respecting her age and parentage, of the most offensive character, with a view to coerce and terrify her into a modification of the terms of the articles of separation. All his pretences and imputations against the *bona fides* of the whole transaction are contradicted, not only by her oath, solemnly pledged and repeated, in the most distinct manner, in various parts of her answer to his cross-bill, but also by the testimony of the witnesses examined in her behalf; by letters and documents; by acts and interviews which preceded and followed the execution of the articles. His allegations of fraud and conspiracy in instituting the suit for nullity of marriage, as a contrivance to compel him, through fear of exposure and degradation, are negatived, not only by Mrs. *Wilson's* answer, but also by the fact that, before that suit was commenced, she, at the suggestion of her advisers, submitted to medical exami-

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nation, the certificate of which satisfied the eminent Civilians before whom it was laid, that she was fully entitled to a decree of nullity.

The appellant's objections to the constitution of the articles of agreement being thus removed by mere reference to the evidence in the cause, it becomes necessary to answer his objections to their legal validity. The first was that all agreements for separation of husband and wife are contrary to public policy, to the policy of marriage, and to moral duty; and that to enforce them in equity or at law is an invasion of the jurisdiction of the Ecclesiastical Courts; but the Judges, whose doubts and *dicta* were cited in support of this objection, gave effect to such agreements in some of the cases that were referred to. Lord *Rosslyn*, in *Legard v. Johnson (a)*, while he disclaimed jurisdiction of a Court of Equity upon a contract between husband and wife to live separate, still recognized the jurisdiction to enforce the executory covenants between the husband and third parties in such a contract, and referred to cases in which the jurisdiction was exercised. Mr. Justice *Buller*, in refusing specific performance of the articles in *Fletcher v. Fletcher (b)*, because there was a suit for restitution of conjugal rights, said, there was no doubt of the general jurisdiction of the court to compel specific performance of articles of separation. Sir *W. Grant* also, in *Worrall v. Jacob (c)*, although he held it to be then settled that a Court of Equity would not execute an agreement for separation between husband and wife, and thought it strange that the auxiliary agreement between the husband and third party should be enforced, yet held such agreement to be valid, and in that very case enforced it, being obliged—as he said, repeating the words of Lord *Eldon* in *St. John v. St. John (d)*—to submit to what was “the settled law on the subject.” And notwithstanding Lord

(a) 3 Ves. 352.

(c) 3 Meriv. 268.

(b) 2 Cox, 99.

(d) 11 Ves. 537.

*Eldon's* complaints in that case of the former decisions, and his recommendation that "the case should be taken to the House of Lords, rather than that the law should remain in that state," yet when soon afterwards he had the case of *Bateman v. the Countess of Ross* (a) before him in this House, he upheld the jurisdiction in equity to enforce an award providing for a separation of husband and wife; and in *Tovey v. Lindsay* (b), another case in this House, his lordship held that a deed of separation had the effect of changing the wife's domicile. So that Lord *Eldon's* decisions in those cases may be set off against his doubts and regrets in the former cases of *Beard v. Webb* (c), and *St. John v. St. John* (d). There is no case in which it has been said that a court of equity is decreeing a separation of husband and wife, when it decrees performance of the husband's covenants in such deeds, over which it only exercises the same jurisdiction that it does on other executory agreements. There are, however, some classes of cases in which neither Courts of law nor equity will interfere in enforcing articles, as where they are made in contemplation of a future separation: *Durand v. Durand* (e), *Durant v. Titley* (f), *Westmeath v. Westmeath* (g), *Hindley v. Westmeath* (h); or in fraud of creditors; *Hobbs v. Hull* (i), *Legard v. Johnson* (k); or where an end is put to the separation by voluntary reconciliation, or decree of restitution of conjugal rights; *Head v. Head* (l), *Fletcher v. Fletcher* (m). The present case does not fall within any of these classes.

The next objection to these articles is, that as they contain no covenant to indemnify the husband against the

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(a) 1 Dow, 135.

(b) *Id.* 117.

(c) 1 Bos. & Pull, 93.

(d) 11 Ves. 526.

(e) 2 Cox, 207.

(f) 7 Price, 557.

(g) Jacob, 125.

(h) 6 Barn. & Cr. 200.

(i) 1 Cox, 445.

(k) 3 Ves. 352.

(l) 3 Atk. 547.

(m) 2 Cox, 99.



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wife's debts, they are void, for want of consideration. The omission of that covenant has been shewn to be a clerical error; and the respondents offered to supply it in the deed intended to carry the articles into execution, which it is quite competent for them to do under the 9th article. *Stephens v. Olive* (a) was the first case in which any reliance was placed on such a covenant to support a deed of separation, but it does not follow that the absence of it would affect the validity of the articles; *Guth v. Guth* (b), *Fitzer v. Fitzer* (c), *Cook v. Wiggins* (d), *Innell v. Newman* (e), *Ross v. Willoughby* (f), *Wilson v. Musshett* (g), *Frampton v. Frampton* (h), *Hindley v. Westmeath* (i). The objection ill becomes the appellant, who admits that he sets no value on such a covenant, and never contemplated it. He has, besides, by the clerical error, obtained a better consideration in the trustees' covenant to pay his own debts, which the decree upholds. He has also the consideration of 1000*l.* a-year, whereas, if the suit compromised by the articles had proceeded to a decree of nullity, he must give up, without any annuity, all the property which he acquired by the marriage. The stopping that suit was of itself a valuable and sufficient consideration: it was the only consideration, beyond the annuity, for which the appellant stipulated. Lord *Hardwicke* says, in *Fitzer v. Fitzer*, (j) "considerations are not to be weighed in too nice scales." Where, however, there is a consideration for the husband's covenants, they will be enforced against him, even where there is no covenant, by a third party or trustee, to indemnify him, as appears in many cases from *Angier v. Angier* (k), down to *Clough v. Lambert* (l).

- (a) 2 Bro. C. C. 90.
- (b) 3 Bro. C. C. 614.
- (c) 2 Atk. 512.
- (d) 10 Ves. 191.
- (e) 4 Barn. & Ald. 419.
- (f) 10 Price 22.

- (g) 3 Barn. & Ad. 743.
- (h) 4 Beav. 287.
- (i) 6 Barn. & Cr. 200.
- (j) 2 Atk. 514.
- (k) Prec. Chan. 296.
- (l) 10 Sim. 174

Next comes the question whether a suit for nullity of marriage, on the ground of impotency, may be compromised by an agreement for separation. The objection attempted to be raised against such a compromise, upon the supposition that there is some principle of public policy to prevent it, is wholly untenable. No principle is stated in support of the fancied distinction drawn between a suit of that sort and suits for divorce in the ordinary cases of adultery and cruelty, which are constantly compromised by private agreements for separation. The temporal Courts, in enforcing the agreement, do not inquire into the cause of separation, nor whether the spiritual courts would grant a divorce. They have no jurisdiction or machinery for conducting such an inquiry; all they inquire into is whether the deed or articles of separation be a valid agreement, and shew sufficient consideration for the covenants between the husband and third parties. The arguments for the appellant on this point are hardly intelligible; if his counsel would adhere to their first broad principle, that every deed of separation which does not appear to be a compromise of a suit for a divorce is illegal, that is a proposition with which one could grapple, and shew that it is contradicted by most, if not all, of the cases, from *Seeling v. Crawley* (a), in the year 1700, to *Jones v. Waite* (b), in 1842. Deeds or articles of separation generally recite that the husband and wife, in consequence of unhappy differences, have agreed to separate, but they seldom disclose the nature or causes of those differences. Adultery and cruelty may be, and often are, the causes; but they are not essential to the validity of the agreement, and the supposition of their existence is excluded in many decided cases, in which other causes are expressly assigned. In *Sanky v. Golding* (c), the cause was "discord," and in *Seeling v. Crawley*, it was "a quarrel." In *Head v. Head* (d) the wife's "infirmities" were the cause;

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(a) 2 Vern. 386.

(c) Carey, 124.

(b) 9 Clark & F. 101.

(d) 3 Atk. 547.

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in *Fletcher v. Fletcher* (a), her "expensiveness." The cause is not mentioned in the reports of *Guth v. Guth* (b), *Stevens v. Olive* (c), *Connpton v. Collinson* (d), *Jee v. Thurlow* (e), *Fitzer v. Fitzer* (f), *Cooke v. Wiggins* (g), or *Frampton v. Frampton* (h), but that it was not for adultery or cruelty appears clear enough. Whenever these or other justifiable causes of separation exist, and the articles show a valuable consideration for the husband's covenants, they will be enforced, even though there is no third party or trustee; *Angier v. Angier* (i), *Clough v. Lambert* (j).

The injunction restraining the appellant from proceeding in his wife's suit, in the Ecclesiastical Court, is consequential on the decree for specific performance of the articles, one of which provided for the termination of that suit. It is contended that it has the effect of a sentence of perpetual separation, inasmuch as it prevents the appellant from suing for restitution of conjugal rights, which, it is said in *Fletcher v. Fletcher* (k), *St. John v. St. John* (l), and *Westmeath v. Westmeath* (m), a court of equity has no power to do. The injunction does not go to that extent, although, if it did, there appears to be no reason for saying that the Court may not, on the application of the trustees, prevent the appellant from a breach of his contract, after a decree for specific performance. The injunction was not an invasion of the jurisdiction of the Ecclesiastical Court, but was intended to preserve the jurisdiction of the Court of Chancery over its own decree, and to prevent the appellant from defeating it, by resorting to another court. In *Hill v. Turner* (n), Lord *Hardwicke* restrained a woman, who

(a) 2 Cox, 99.

(b) 3 Bro. C. C. 614.

(c) 2 Bro. C. C. 90.

(d) Id. 377.

(e) 2 Barn. & Cr. 547.

(f) 2 Atk. 511.

(g) 10 Ves. 191.

(h) 4 Beav. 287.

(i) Pre. Ch. 497.

(j) 10 Sim. 174.

(k) 2 Cox, 99.

(l) 11 Ves. 527.

(m) Jac. 125; 1 Dow & C. 547.

(n) 1 Atk. 515.

married a ward of court clandestinely, from proceeding in the Ecclesiastical Court against the infant for restitution of conjugal rights, or against his guardian for alimony. In *The Bishop of Winchester v. Paine* (a), a party was restrained by injunction from obtaining probate of a will by fraud. This injunction had for its object to compel obedience to the decree ; if that is not sustained, the injunction falls with it ; but if it is sustained, the appellant has no reason for complaining of the injunction.

The evidence of the medical gentlemen, rejected at the hearing, and of the rejection of which the appellant complains, might be received in answer to the allegations in the suit in the Ecclesiastical Court, but was immaterial to the issue in this cause, and was therefore rejected on the established doctrines and rules of Courts of Equity ; *Attwood v. Small* (b) ; and so also were Captain *Wilson's* depositions, the appellant not having put in issue the points to which they were applicable ; *Watkins v. Watkins* (c).

Sir *F. Kelly* in reply.

The appellant and his wife lived together in apparent amity until *May* 1843 ; if they had differences, they arose about the management of their property or servants. There is no charge of adultery or cruelty indicated in the articles, but even the supposition of the existence of these causes of separation is excluded in the compromise of a suit for nullity. The question is whether a Court of Equity will support that compromise under the circumstances of this case. The appellant's argument is not, as alleged on the other side, that the Court will not execute articles of separation except where they are a private arrangement and compromise of a suit for divorce, on the ground of adultery or cruelty. The principle for which he contends is, that a Court of Equity confines its interference to cases

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(a) 11 Ves., 199 (*sed quare*, as to the point). (b) 6 Clark & Fin. 350, 516. (c) 2 Atk. 96.

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in which one of the parties might have proceeded in the Ecclesiastical Court for divorce; and then, if both parties and their friends, to prevent publicity, will arrange among themselves to do what the spiritual court would decree, Equity will support the arrangement. The possibility of the existence of any grounds for a divorce is excluded from this case. The cause of separation is not immaterial; the Courts of law as well as equity regard it; *Angier v. Angier* (a), *Nunn v. Willsmore* (b), (per *J. J. Lawrence* and *Le Blanc*). On that point it was that there was a difference of opinion among the judges, in *Jones v. Waite* (c), Lords *Denman* and *Abinger* thinking that the record ought to have stated the cause of separation, all of them admitting that there must be sufficient cause, though not stated. The contract of marriage is not to be affected by every arrangement to which the husband and wife may agree. The observations of Lord *Eldon* in *Beard v. Webb* (d), *St. John v. St. John* (e), and *Westmeath v. Westmeath* (f), on this point, are entitled to the greatest respect. To give effect to all voluntary agreements between husband and wife in derogation of marriage, is contrary to public policy and morality, and this House will be cautious not to extend the principle.

There is no mutuality in this agreement; the wife agrees to put an end to her suit for nullity for 2000*l.* a-year, and after the property is conveyed by her husband, she is at liberty to proceed in the suit; she cannot be prevented, but he cannot recover back his property. That consideration alone vitiates the articles. The injunction against the appellant brings the decree in conflict with the jurisdiction of the Ecclesiastical Court. It is impossible to escape from this conclusion, that if it be right to restrain the husband from seeking restitution of his conjugal rights

(a) Pre. Cha. 496.

(b) 8 T. Rep. 521.

(c) 5 Bing. N. C. 341.

(d) 1 Bos. & Pull. 99.

(e) 11 Ves. 527.

(f) Jacob, 125.

for a time, it cannot be wrong to separate him from his wife permanently. It is the husband's duty to seek and to exercise his conjugal rights, and any decree of court preventing him, is opposed to the policy of marriage. If there are articles which cannot be enforced against both parties, why enforce them at all?

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With respect to the cross bill, the competency of the appellant is thereby put in issue; he examined witnesses, who say there is no malconformation, as the wife alleged, and he says he consummated the marriage. She swore he did not. The evidence tendered by the appellant, applicable to that issue, was improperly rejected.

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The *Lord Chancellor*.—In this case the articles of separation are between the husband, of the first part, the wife of the second part, and two trustees of the third part, reciting that the husband and wife had agreed to live separate and apart. The agreement is between the husband on the one part, and the two trustees, with the privity and approbation of the wife, on the other part; and it provides, *First*, that the wife may live separate; *Secondly*, that the husband shall give up, for the use of the wife, certain property belonging to her, but in which he had a life estate under the marriage settlement; *Thirdly*, that certain other estates, not included in the marriage settlement, should be enjoyed by the wife for her separate use during their joint lives, subject to an annuity of 1000*l.* a-year to the husband; *Fourthly*, it provides for securing to the wife certain jewels, furniture, and other articles, and securing to the husband 1000*l.* *per annum*; then it provides for executing a proper deed to effect these objects; and, *lastly*, it provides for putting an end to a suit instituted by the wife for nullity of marriage, conditioned if the husband should keep this contract.

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The decree against which the appeal has been presented, directed a specific performance of these articles, and the execution of a proper deed for that purpose, with the necessary inquiries and directions; and it restrained the husband from any proceeding to compel the wife to proceed in the suit in the Ecclesiastical Court, or to pay the costs; and it dismissed the husband's cross cause, and ordered him to pay the costs of both suits.

The appeal was attempted to be supported upon two grounds; *first*, on the ground that the articles had been obtained by intimidation and duress—this, I think, wholly failed, and the cross bill was properly dismissed, with costs;—and, *secondly*, because Courts of Equity ought not to entertain jurisdiction for performance of articles of separation.

The second head gave rise to a very protracted and learned argument, in which very many cases were cited, but of which very few, of the later date, seem to me necessary to be adverted to; for if those later cases, particularly some which have been decided in this House, have settled the law, all those which preceded them may be thrown aside.

It must be observed that the decree appealed from does not touch the question of separation, but only makes provision for a previous contract for that purpose; and enforces a contract respecting property growing out of such separation. If an agreement for the separation and living apart of a husband and wife be so contrary to public policy, and therefore illegal, as to make void all arrangements of property arising from it, then, in all cases, the only question would be, whether the arrangement of property was in consideration of or dependent on such illegal agreement. But what has this House decided upon the subject? In the very recent case of *Jones*

v. *Waite* (a) the question was whether the execution of a deed of separation was a sufficient consideration for the agreement in question there, or whether it was illegal and void. Chief Justice *Tindal* said, "My brothers and myself are of opinion that there is no illegality disclosed by this agreement; one part of the consideration for it is the execution of the deed of separation, which, as clearly appears from the declaration, was previously agreed upon and drawn up.

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A case of *Bateman v. The Countess of Ross* (b) had previously (in 1813) occurred in this House, in which Lord *Eldon* and Lord *Redesdale* held an award good, which confirmed an arrangement of property "provided the husband and wife shall continue to live separate and apart;" Lord *Eldon* saying, "It was objected to the award that it assumed the jurisdiction of the Ecclesiastical Court in awarding a separation; but it did no such thing, it only assumed that there must be a separation, and provided accordingly." This case coming after that of *St. John v. St. John* (c), takes off much from the weight of Lord *Eldon's* observations in that case.

In *Westmeath v. Westmeath* (d) the objection was, that the deed provided for a future separation; and there Lord *Eldon* says, "I apprehend that any instrument which provides for a present separation, and which prospectively looks to the parties living together again, and then to a future separation, that such a deed, so far as it provides for that future separation, will never be carried into effect."

The authorities in this House are therefore against the appellant; and a now long train of authorities at law and in equity has proceeded upon the same ground, but I

(a) 9 Clark & F. 101.

(c) 11 Ves. 528.

(b) 1 Dow, 235.

(d) 5 Bli. 367; 1 Dow & C. 519.



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will only mention the case at law of *Wilson v. Mus-  
 hett* (a). In *Frampton v. Frampton* (b), Lord Langdale  
 considered the principle established; and the Vice Chan-  
 cellor has held the same in several cases, such as *Clough*  
*v. Lambert* (c), and *Wellesley v. Wellesley* (d).

It was contended that there was no consideration for the  
 deed, because there was no indemnity against the wife's  
 debts, but only against those then owing by the husband.  
 That, under the circumstances, was probably a more valua-  
 ble indemnity than the other would have been; and there are  
 other ample considerations for the deed. One part of the  
 consideration is the provision as to the suit in the Eccle-  
 siastical Court. The stopping of those proceedings appears  
 to have been an important object to Mr. *Wilson*—of the  
 reason for which he was the best judge—and that alone  
 was a sufficient consideration. In *Bateman v. the Coun-  
 tess of Ross* (c), there was a suit pending for a divorce.  
 Why is not the compromise of such a suit to afford con-  
 sideration for an agreement? Is it desirable that the par-  
 ties should be compelled to bring such complaint in the  
 Ecclesiastical Court to public discussion? A similar  
 answer applies to an argument, for which no authority was  
 cited, that the court will enforce such agreement only in  
 cases in which the wife might have obtained alimony in  
 an Ecclesiastical Court. How is a Court of Equity to try  
 that? and upon what principles can such a rule stand?  
 If the consideration or fact of separation does not conta-  
 minate all that proceeds from it, the court is only exercis-  
 ing its ordinary jurisdiction in giving effect to the arrange-  
 ment of property agreed upon.

It was then said that the suit for nullity might end in a  
 sentence for restitution of conjugal rights, and that the in-

(a) 3 Barn. & Ad. 743.

(b) 4 Beav. 287.

(c) 10 Sim. 174.

(d) *Id.* 256.

(e) 1 Dow, 135.

junction was calculated to prevent that object. It only prevents an unjust use being made by the husband of the wife's proceedings, instituted for a very different purpose, and does not interfere with any proceeding that the husband may adopt. It was said that there was nothing to prevent the wife prosecuting that suit. This court does not interfere by injunction, when there is no prospect of danger, and if it should arise, the question might be raised in another suit.

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The documents rejected were, I think, inapplicable, and if produced, could not have had any effect, and were, I think, properly rejected.

I therefore advise your lordships to affirm the whole of the decree, and to dismiss the appeal, with costs.

It was ordered accordingly.

[Besides the numerous cases mentioned in the report, the following were also cited, in the arguments : *Mildmay v. Mildmay*, 1 Vern. 53 ; *Sidney v. Sidney*, 3 P. Wms. 269 ; *Wilkes v. Wilkes*, 2 Dickens, 791 ; *Marshall v. Rutton*, 8 T. R. 549 ; *Seagrave v. Seagrave*, 13 Ves. 437. And manuscript notes and extracts from the registrar's books were read, explaining and correcting the reports of *Wilkes v. Wilkes*, and *Guth v. Guth*, in 3 Bro. C. C. 614.]

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 April 14, 21. The Right Hon. MATHEW LORD MUSKERRY *Respondent.*  
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 June 23, 29, 30.  
 July 2, 7.  
 1848.  
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*Power of  
 Leasing.  
 Validity of  
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HUSBAND and wife, by a post-nuptial settlement, conveyed part of the wife's estates to a trustee to the use of the husband for life, remainder to their eldest son for life, &c., with an ultimate remainder in fee to the husband, and a power to him to lease "for any time or term of years or lives, and with or without covenants for renewal; and in case of the determination of all or any of the aforesaid lease or leases, to make new or other leases thereof in manner aforesaid, and with or without any fine or fines as he should think fit." The husband was also empowered to raise, by sale or mortgage, any sum or sums of money not exceeding in the whole 20,000*l.*, or to charge the premises therewith, for such uses as he should appoint, and to charge to any amount for younger children. The husband and wife afterwards executed three leases of parts of the estates comprised in the settlement for terms of 999 years, upon which fines were taken. One of the leases contained a clause permitting the lessee to graff and burn the surface, and also a clause of surrender; and another contained clauses making the lessee dispunishable for waste, and permitting him to cut timber, and to graff and burn the surface, and in this lease was included part of the wife's estate not comprised in the settlement. The latter lease, and another of prior date, were made subject to existing freehold leases. None of the leases were referred in the power. The fines received on the making of these and other leases amounted to 10,208*l.*, and the husband subsequently raised 10,500*l.* by mortgage of the estates subject to the leases:

HELD, that all the leases were valid at law, as being authorised by the power in the settlement; and consequently there was no ground of equity to impeach them.

Regard is to be had to the objects of the settlement, where the power is of doubtful construction; but no such consideration is to control powers expressed in clear terms, according to their ordinary acceptation.

THE Bill in this case, filed in 1819 and amended in 1826, prayed, among other things, that certain leases after mentioned, might be declared void, as not warranted by any power contained in a post-nuptial settlement dated

the 25th of *May*, 1779. By that settlement Sir *Robert Tylson Deane* and Dame *Anne*, his wife—for assuring the lands therein mentioned, and making a provision for a jointure for Dame *Anne*, and further provision for their children (two sons being then born)—conveyed to a trustee the *Springfield* and *Farrihy* estates (the property of the said *Anne*), situated in the county of *Limerick*, to the use of the said Sir *Robert* for life, without impeachment of waste, with remainder to the said *Anne* for life; remainder to *Robert F. Deane*, their then eldest son, for life, without impeachment of waste, and to his first and every other son in tail male; with like remainder to *John Thomas F. Deane*, their then second son, and his first and other sons, &c., with an ultimate remainder in fee to Sir *Robert*.

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And it was thereby provided “that it shall and may be lawful to and for the said Sir *R. T. Deane*, from time to time, and at all times during his life, to lease and demise all, every, or any part or parts, parcel or parcels, of the aforesaid towns, lands, tenements, hereditaments, and premises for any time or term of years or lives, and with or without covenant for renewals: And in case of the determination of all or any of the aforesaid lease or leases respectively, from time to time to make new or other leases thereof, in manner aforesaid, and with or without any fine or fines, as he shall think fit.”

It was by the said settlement further provided that it should be lawful for Sir *R. T. Deane* to charge and encumber the said premises, or any part or parts thereof, with any sums for the younger child or children of the said Sir *Robert*, begotten or to be begotten on the said Dame *Anne*, in such proportions and manner, and payable at such time or times as he should by deed or will appoint. And it was further provided that it should be lawful for the said Sir *Robert* to raise and levy, by one or more sales or mortgages of all or any part of the premises, any sum or sums of money not exceeding in the whole the sum of

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20,000*l.*, or to charge the premises therewith, to and for such use and uses as he should at any time or times by deed or will appoint. And Sir *Robert* and Dame *Anne* thereby covenanted that they would, before the end of the then next Trinity Term, levy a fine of the said lands, to the trustee, to enure to the uses of the settlement (which fine was levied accordingly).

By an endorsement on the settlement, it was agreed between the parties thereto, previous to its execution, that the said *Robert F. Deane* and *John Thomas F. Deane*, and every other child of Sir *Robert* and Dame *Anne*, who should, under the limitations therein contained, be in possession of the premises, should have power to make leases of the whole, or any part thereof, for any term not exceeding three lives, or thirty-one years, provided such lease should be made to commence in possession, and at the best improved yearly rent that could be had for the same at the time of making such lease: And that no fine or other consideration should be taken for or on account of the making thereof.

The settlement did not comprise the lands of *Gurtaheedy*, in the county of *Cork*, which were the fee simple estate of Dame *Anne Deane*, nor any estate of Sir *R. T. Deane*.

By an indenture of lease, dated the 26th of *August*, 1779, Sir *R. T. Deane* and *Anne* his wife, in consideration of 1000*l.*, demised to *William Sheehy*, for a term of 999 years, and at the rent of 20*l.*, part of the *Springfield* estate, called *Rosnerilane*, containing ninety-eight acres, and another part of *Springfield*, which was subject to a lease made on the 28th of *February*, 1746, for three lives, at a rent of 40*l.* 3*s.* The rent reserved in this lease to *W. Sheehy*, was less than the former rents payable out of the same lands.

By indenture of lease dated the 28th of *October*, 1779, Sir *R. T. Deane* and *Anne* his wife, in consideration of

2000*l.*, demised to *Roger Sheehy* the younger, the lands of *Clonmore*, another part of the *Springfield* estate, and containing 450 acres, for a term of 999 years, at a rent of 50*l.* This lease contained permission to the lessee, his executors, &c., during the demised term, "to graff, cut, and burn the soil and surface of all or any part of the lands thereby demised, without being liable to any penalty or forfeiture for the same, notwithstanding the several acts of Parliament in force in *Ireland* to prevent the practice of burning land:" and it also contained a clause empowering the lessee, his executors, &c., to quit and surrender the demised premises at the end of every year of the said term, upon giving six months' notice in writing.

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By indenture of lease dated the 14th of *June*, 1780, Sir *R. T. Deane* and *Anne* his wife, in consideration of 5,708*l.*, demised to *Roger Sheehy*, the elder, several other parts of the lands of the *Springfield* and *Farrihy* estates, containing together about 630 acres, all situated in the county of *Limerick*, and also the lands of *Gurtaheedy*, containing seventeen and a half acres, situated in the county of *Cork*; subject to remainders of unexpired terms of different leases then subsisting, and set out in a schedule annexed to this lease; To hold the said lands for the term of 999 years, at the rent of 50*l.*, without impeachment of waste; with power to the said lessee, his executors, &c., to cut, fell, and carry away all timber and other trees then growing, or which thereafter should grow, on the demised premises, and to graff and burn any part thereof as often as he or they should think proper. The schedule specified five leases for lives of different portions of the said lands as subsisting at the date of this indenture, all which were executed previously to the settlement of the 25th of *May*, 1779. The rents reserved by them were greater than the rent reserved by the last-recited lease.

Each of the above-stated three indentures contained

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covenants on the part of Sir *R. T. Deane* and *Anne* his wife, to levy fines to the lessees, for confirming the said demises, but it did not appear that any fines were ever levied. All the lands demised by them, except *Gurta-heedy*, were lands comprised in the settlement of the 25th of *May*, 1779. The several lessees entered into possession of the premises respectively demised to them, and they or their representatives continued in the undisturbed possession for near forty years. The three leases became vested in one or other of the appellants. Other leases of other parts of the estates comprised in the said settlement were granted by Sir *R. T. Deane* and *Anne* his wife, 'about the same time, and the fines received on all the leases amounted to 10,208*l.*: And by two mortgages executed by Sir *Robert* in 1780 and 1783 of the same estates, subject to the leases, a further sum of 10,500*l.* was raised.

Sir *R. T. Deane* was, in the year 1781, created Baron *Muskerry* in *Ireland*. He died in 1818, leaving the said *Anne*, Baroness *Muskerry*, his widow, and *John Thomas F. Deane*—who, being then his eldest son, became Lord *Muskerry*—and *Matthew F. Deane*, the respondent, his only surviving issue. They filed the original bill in 1819, impeaching the said leases, and on the death of *John Thomas*, Lord *Muskerry*, without issue, in 1824, *Matthew Fitzmaurice Deane*, his brother, became Lord *Muskerry*, and filed the amended bill in 1826.

The cause was heard in *November* 1832, by Lord *Plunket*, then Lord Chancellor of *Ireland*, who directed a case to be sent for the opinion of the Court of Common Pleas upon the question:

“Whether the leases, dated respectively the 26th of *August* and 28th of *October*, 1779, and the 14th of *June*, 1780, and made by Sir *R. T. Deane*, afterwards created Baron *Muskerry*, and Dame *Anne* his wife, to *W. Sheehy*, *R. Sheehy* the younger and *R. Sheehy* the elder, respec-

tively, or any, or either, or which of them, were or was warranted by any power contained in the deed dated the 25th of *May*, 1779?"

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The Judges of the Court of Common Pleas, after hearing the argument on the case so sent to them, agreed in certifying "that the leases were not warranted by any power in the said settlement."

The cause came on for hearing on that certificate, and for further directions, in *February* 1835, before Sir *E. Sugden*, then Lord Chancellor. His lordship called to his assistance the Chief Justice of the Court of Common Pleas and the Chief Baron of the Exchequer, to hear the arguments on the question of the legal validity of the leases; and, without asking them to deliver their opinions in Court, he delivered his own, which was that the leases were valid, as being authorised by the general terms of the power contained in the settlement (*a*); and the Chief Baron communicated to him in writing his opinion, which was to the same effect (*b*).

The cause was reheard in *June* 1835, by Lord *Plunket*, then again Lord Chancellor, who agreed with the opinion given by the Judges of the Court of Common Pleas, that the leases were not warranted by any power contained in the said settlement: And his lordship further declared that there was no ground for sustaining them on equitable principles; and he decreed that they should be set aside as void, and that an injunction should be issued to put the respondent in possession of the premises comprised in them (*c*).

There was an appeal to the House of Lords from that decree and previous orders, which were set aside by the House, and the cause was remitted for further consideration

(*a*) See *Lloyd & G., Cas.* (6th and 7th ed.) App. No. 18. temp. Sir *E. Sugden*, 185. (*c*) *Lloyd & G., Cas.* temp. (*b*) See 2 *Sugden on Powers*, Lord *Plunket*, 182; see p. 206.



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to the Court of Chancery in *Ireland*, with a declaration, but without the expression of any opinion as to the validity of the leases (*a*).

The cause having been set down for hearing on the remit, on the 5th of *November* 1839, Lord *Plunket* (Lord Chancellor) made an order, on the application of the appellants, for obtaining the opinion of the Court of Queen's Bench on the same case and question that were before submitted to the Court of Common Pleas. The case having been accordingly argued in the Court of Queen's Bench (*b*), three of the judges there certified their opinion that none of the leases was warranted by any power in the settlement; the fourth (Mr. Justice *Crampton*) certified his opinion that they were all warranted by the extraordinary leasing power given to Sir *R. T. Deane* by the settlement.

Lord *Plunket*, on the hearing of the cause, upon these certificates, on the 24th of *June*, 1840, gave his judgment, agreeing with the majority of the judges, and decreed, in the terms of his former decree (*c*) that the leases were void both at law and equity.

This appeal against the last decree, and the order of the 5th of *November*, was partly heard on the 14th and 21st of *April*, 1845, by Lord *Lyndhurst* (then Lord Chancellor,) and Lords *Brougham* and *Cottenham*, who, before the arguments for the appellants were brought to a conclusion, observed that the question of law on the construction of the power and of the leases, rendered it necessary to have the assistance of the common law judges; and the further hearing was adjourned, and an order made for their attendance.

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The case was argued in the session of 1846, before Lord *Cottenham*, presiding for the Lord Chancellor, and in the

(*a*) 7 Cl. & F. 1; see p. 42.      (*c*) Lloyd & G. temp. Lord  
 (*b*) 2Jebb & Symes 300.      Plunket, p. 206.

presence of the Judges of the common law courts (a). The arguments were confined to the question of law, with the understanding that counsel would afterwards, if necessary, be heard on the equities between the parties.

Mr. *G. Turner* and Mr. *J. Russell* were for the appellants.

Sir *Fitzroy Kelly* and Mr. *Peacock* were for the respondent.

[The arguments in the Courts below, upon the questions raised in the appeal, are given so fully in the reports before referred to, particularly in 2 *Jebb & Symes*, pp. 304 to 321, as to render it unnecessary to report them again, especially as it appears, on comparison of the notes of the arguments on the present occasion with those already in print, that no new point was made. The following additional authorities were cited: *Wynne v. Griffith*, 1 Russ. 283, and *Lovell v. Knight*, 3 Sim. 275, on the undue execution of a power, for want of reference to it in the instrument; *Earl of Cardigan v. Montague*, 2 Sugd. on Pow. Appendix, No. 14; *Doe dem. Hartridge v. Gilbert*, 5 Queen's Bench Rep. 423, and *Jack v. Mc Intyre*, 12 Clark and Fin. 151, on the construction of leases; and *Oddie v. Woodford*, 3 Myl. & Cr. 585, and *Hoare v. Byng*, 10 Clark and Fin. 508; and Sugd. on Pow. *passim* (new ed.), on the construction of instruments generally.

The objections to the leases, and the answers given to them in the arguments, are succinctly stated in the opinion of the judges which follows:]

Lord *Cottenham*, at the conclusion of the arguments, said he could not frame a question for the learned judges in a better form than that which had been submitted to the

(a) The judges were Mr. Baron *Alderson*, Justices *Williams*, *Coltman*, *Maule*, *Wightman*, and *Cresswell*, and Barons *Rolfe* and *Platt*. Lord Chief Justice *Tindal* was present on the first day

of the argument, but was next day seized with illness, and died a few days after. Baron *Parke* also was on present the second day only.

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judges of the Courts of Common Pleas and Queen's Bench in *Ireland* (*videsupra*, 580-1.) His lordship handed a copy of that question to them, and, at their request, time was given to them to consider their answer.

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Mr. Baron *Alderson* delivered the unanimous opinion of the Judges as follows :

The question proposed by your lordships to her Majesty's judges, depends on the proper construction of the power given by the deed of settlement, dated the 25th of *May*, 1779, to Sir *Robert Titson Deane* ; for if all or any of the three leases, dated the 26th of *August* and 28th of *October*, 1779, and 14th of *June*, 1780, be a valid execution of that power, it is clear that such lease or leases is or are valid at law. There is no case, we believe, to be found in our books, in which a lease conformable to the literal tenor of the words in which the power is given has been held invalid at law, on the ground of any supposed or real hardship thereby inflicted upon the remainder-man ; and it would be strange if such a case could be found, for as the remainder-man takes what is given to him subject to the power, he must take the advantage *cum onere*, and has no reasonable ground for complaint if that should happen which the framer of the power, who had the *jus disponendi*, contemplated. But undoubtedly there are several cases to be found in which the exercise of a power, not literally and in terms executed, has been proposed to be supported as being a substantial exercise of the authority given, and there the general intention of the donor of the power, and the advantage or injury arising therefrom to the remainder-man, have been looked at for the purpose of solving the question before the Court.

And in all cases, in order to determine what is the real meaning of the words of the power itself, it must be competent for the Court to look to the whole instrument in which it is found, and to examine and consider the consequences to the remainder-man and to the other objects of the deed, for the purpose, if the words be ambiguous, of

adopting that construction of them which may produce the least inconvenience, and best harmonize with all the other provisions which the parties have thought proper to make. Of this the case of *Talbot v. Tipper* (a) is an instance. There, though the power was to make leases with or without fine, and reserving such rents and services as the donee of the power should think fit, a lease without reserving any rent, though certainly not according to the literal tenor of the power, was, on examining the whole instrument, and looking to the real intention of the donor of the power, held to be a valid lease.

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In considering this power, therefore, we shall first examine the words themselves, and then, but only if the words require it, look to the other parts of the deed for the purpose of explaining them. The power itself, which is found in a settlement, made after marriage, of the wife's property, and a settlement no doubt for valuable consideration, is in these words:—

“Provided also, and it is agreed by and between the parties to these presents, that it shall and may be lawful to and for the said Sir *Robert*, from time to time and at all times during his life, to lease and demise all, every, or any part or parts, parcel or parcels of the aforesaid towns, lands, tenements, hereditaments, and premises, for any time or term of years or lives, and with or without covenant for renewals, and in case of the determination of all or any of the aforesaid lease or leases respectively, to make new or other leases thereof in manner aforesaid, and with or without any fine or fines, as he shall think fit.”

We think that the natural and ordinary meaning of these words imports that Sir *Robert* should, as he should think fit, make leases of all or any part of the premises; that such leases should be, at his pleasure, for any term of years or any lives; that such leases should be with or without covenants for renewals, as he might think prefer-

(a) *Skinner*, 427.

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able; that on the determination of such leases, similar leases should be granted afresh; and that all such leases, whether original or renewed leases, should be, at his discretion, with or without fines. The words "as he shall think fit," apply clearly to every clause in the power; and the words "with or without fines," apply also, as we think, to each of the two classes of leases, original or renewed. No doubt such a power would enable Sir *Robert* to deprive the other parties to the deed, and those interested in remainder, of advantages which but for the power would have come to them; but this is an effect consequent in some degree upon the exercise of all such powers; and precisely the same consequences will in this case follow if we adopt that construction of this power, by which the words "with or without fines" are confined to the renewed leases alone; for if this construction should be adopted it would equally be in the power of Sir *Robert*, by granting an original lease for a short term, upon its determination to grant a lease for a long term upon a fine, thus producing to the remainder-man the same inconvenience practically which would arise from granting an original lease taking a fine; or he might grant a long lease at a peppercorn rent to a trustee for himself, and then dispose of that lease for his own advantage and benefit.

But it is suggested that the clause as to fines may be applied to the covenant for renewal alone. This construction, however, takes the words very far from their natural import, and is so far-fetched, and difficult to be understood that we cannot adopt it, even if it did not, like the others, labour under nearly the same difficulties as to the situation in which it leaves the remainder-man. We think, therefore, that under this power Sir *Robert Tilson Deane* might well make a valid lease of any part of this settled estate for any period of years or for lives, at his pleasure; that there is nothing in the power to limit him as to the rent; that he was, therefore, at liberty to take a rack rent

without a fine, or any other rent with a fine, and upon determination of any such lease, to renew it on the same or similar terms. The parties by whom the settlement was made had the complete *jus disponendi*, and they have chosen to give this unlimited power, knowing, as they clearly did, and as appears from the indorsement on the settlement, how to frame a limited power when their intention was to give one. For there they require the lease to be in possession, and not in reversion; they limit the term; they direct the rent to be the best that can be obtained, and they exclude fines altogether. These limitations of the power, thus imposed, appear to us strong circumstances to show that, inasmuch as in the previous power they are not found, the intention of the donors of that power was that it should be unlimited. And the cases of *Long v. Long* (a), *Attorney General v. Moses* (b), and the *Attorney General v. Wray* (c), are authorities in point, to show how such powers are to be construed. We think, therefore, that the first objection taken to these leases, which applies to all, viz., that they are made upon a fine given, is not valid. This power authorized a lease with or without a fine.

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The second objection is, that these leases do not purport to be made under the power; but this objection is answered by the case of *Tomlinson v. Dighton* (d). The opinion of *Parker*, C. J., in that case, is exactly in point with the present one. This objection, therefore, also fails.

The third objection was, that these leases included as well property in possession as property already under lease, and that as to the latter they were therefore leases in reversion. But there are two answers to this objection: first, the power is general, and is not confined to leases

(a) 5 Ves. 445.

(c) Jacob, 307.

(b) 2 Madd. 294.

(d) 10 Mod. 35.

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in possession alone, as the limited power endorsed on the settlement is. But, secondly, this is, as to the property under lease, only a concurrent lease; and such a lease, if made for a period within the authority given by the power, is clearly valid. The instance of Bishops' concurrent leases manifestly shows the principle, and demonstrates that such leases, if they do not exceed twenty-one years, are within the statutable power conferred by 1 *Eliz.*, c. 19. Those cases, in which leases in reversion have been held invalid executions of the power, are cases where, from the commencement of the lease at a day subsequent to its date, the land is rendered liable to the burden of the lease for a longer period from the date when the lease was executed than was warranted by the power given. Such are the cases of the invalid ecclesiastical concurrent leases mentioned in Bacon's Abridgement (*a*). So in *Doe v. Hiern* (*b*), under a power to lease for ninety-nine years, determinable on the death of one, two, or three lives, a lease was made to commence after the death of J. L. and M. R., for ninety-nine years, determinable on the death of E. H., and it was held bad: For, as Lord *Ellenborough* said, it certainly was not the intention that the tenant for life should do more than incumber the estate to the extent of a term of ninety-nine years determinable on three lives; yet in that case, supposing the continuance of E. H.'s life, it is obvious that such a lease, if valid, might have exceeded ninety-nine years by the period during which J. L. and M. R. might have continued to live, or still further, it was an estate for ninety-nine years determinable, but commencing at a future indefinite period, namely, at the death of two subsisting lives. This lease, however, may be, under the power, for any term of years, and consequently the term cannot here be exceeded, being by the power unlimited.

These three objections are all that apply to the lease

(*a*) Tit. Lease (E), rule 3.      (*b*) 5 Maule & S., 40.

dated 26th of *August*, 1779. We are therefore of opinion that that lease is at law valid.

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The fourth objection, that the lessee shall be at liberty, on giving six months' notice, to surrender his lease, applies to the lease of the 28th of *October*, 1779, alone; but we think that it is no objection to its validity; the unlimited power of leasing is an answer to it; for a lease for a term of years, with a clause enabling the tenant to surrender, is still a lease for a term of years; and the donor of the power has not thought fit to impose any such limitation as that suggested; neither is it very easy to see how such a clause in a lease upon which a fine of 2,000*l.* has been paid is at all likely to be acted upon to the prejudice of the remainder-man, even if that were, which we think it is not, the proper criterion. No doubt, if a power be given to make leases containing the usual reservations and covenants, and such a covenant to surrender were shown to be an unusual covenant, a lease containing it would be an invalid execution of such a power: such was in truth the case cited at the bar of *Jack v. Creed (a)*, but where the power contains no such limitation, we think there can be no such objection made.

The same answer, that the power contains no limitation, applies also to the objections that the leases of the 28th of *October*, 1779, and 14th of *June*, 1780, contain a permission to graff or burn the land, and that in the latter lease the tenant is also allowed to commit waste, and to cut timber. As to grafting, it is by no means clear that in certain cases it may not be advantageous to the land. In the *Irish* statute on the subject, it is only called bad husbandry, and is made the subject of a fine, unless done by the landlord's consent. This shews that the legislature contemplated the possibility of his giving his consent; and here by the lease made under an unlimited power, he has done so, probably because he did not think

(a) 2 Hudson & Brooke, 128.



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it would be prejudicial to the land. As to waste, that is, in an unlimited power like the present, entirely in the discretion of the donee of the power; a discretion in the case of tenants in tail recognized and restrained by the statute 32 *Hen.* 8, cap. 28. And as to cutting timber, it is only necessary to advert to the duration of the lease, 999 years, which is admitted to be in conformity with the power, to see that it is a very reasonable stipulation.

The only remaining objection applies to the lease of the 14th of *June*, 1780, alone. This lease contains land not within the power as well as land subject to it, and only one rent is reserved for the whole. Now, if the power had contained any such limitation as that the best, or the ancient, or the usual rent, should be reserved, this would have been a good objection; for in such a case it ought to appear by the lease itself what is the rent for the land subject to the power, that the remainder-man may judge of it, and see whether the power has been duly executed; but here no restriction is found in the power; any rent will satisfy it. Inasmuch, therefore, as, under this reservation, it is clear some rent is reserved, and any rent is a compliance with the power, we think it is sufficient. Undoubtedly the remainder-man may be subjected to some inconvenience, both in this case and in the case of the concurrent leases; but such an inconvenience does not make the execution of the power in either case invalid.

I have now gone through all the objections to these leases, assigning the reasons which have occurred to my mind why they are all untenable, and for which reasons I alone am responsible. But I am authorized by my learned brethren to express our unanimous opinion on this subject, that in answer to your lordships' question we think that each and all of the three leases, dated the 25th of *August*, 1779, 28th of *October*, 1779, and 14th of *June*, 1780, is and are valid at law.

Lord *Lyndhurst* (a).—I only heard part of the argument in this case. I entertain, however, a strong impression with respect to it, and that is confirmed by the opinion which has been delivered by the learned judge, speaking for himself and for his learned brethren. I think it would not be proper that I should move for the judgment of your lordships now, because the case was heard throughout by my noble and learned friend, Lord *Cottenham*. I propose, therefore, that the opinion of the learned Judges should be printed, and that your lordships' judgment be postponed.

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Lord *Brougham*.—I am in the same position with my noble and learned friend. I did not hear the whole of the argument, but, as far as I did hear it, I agree with the opinion which has been given by the learned judges.

I am very glad that this long litigation is at length coming to a close. It has been here a number of years, backwards and forwards in different ways, both in *Ireland* and here, and is a reproach to the law.

My noble and learned friend who heard the whole of the case not being now present, I agree in the suggestion that your lordship's judgment should be deferred till he attends. The parties, however, may be quite sure that no great length of time will elapse before the decision is given.

Lord *Lyndhurst*.—I consider this case to be—as my noble and learned friend has stated—quite a reproach to the law.

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*The Lord Chancellor*.—My Lords, in this case questions have arisen of great difficulty, which have occasioned great diversity of opinion amongst the highest authorities. There has been not only a difference of opinion between two eminent Lord Chancellors of *Ireland*, but on one side there are the opinions of seven of the

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(a) His lordship had just resigned the great seal; which was then re-delivered to Lord *Cottenham*.

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Judges of the Court of Common Pleas and Queen's Bench in *Ireland*, and on the other, the opinions of one of the Judges of the Queen's Bench in *Ireland* and of eight *English* Judges, who assisted your Lordships at the hearing of this case, and whose opinion is now before us for our consideration.

The appeal, as it originally came before your Lordships, was against two orders of the Court of Chancery in *Ireland*, dated respectively the 8th and 28th of *May*, 1835, and against a decree of the court, dated the 13th of *July*, 1835. The orders and decree were disposed of by your Lordships' order of the 11th of *June*, 1839, which, after making a declaration that it was competent for the Court of Chancery in *Ireland*, in the then state of the proceedings, to adjudicate as to the validity of the leases in question, remitted the case to the Court of Chancery in *Ireland* for the purpose (7 Cl. & F. 42).

The result of the remit has been that the Court of Chancery in *Ireland*, after taking the opinion of the Court of Queen's Bench there—three of the four Judges of which court concurred with the Judges of the Common Pleas (whose opinion had been before taken) in thinking that the leases were not warranted by the power, and were therefore invalid—made a decree setting aside all the leases in question.

When this decree came before your Lordships by appeal, it appeared to be a case in which the House ought to have the assistance of the learned Judges, and eight of the Judges attended your Lordships at the hearing, and their unanimous opinion declared in this House was, that all such leases were valid at law.

I have considered this opinion with great attention and care, as well as those of the learned Judges of *Ireland*, and I have, not without some reluctance, but without any doubt, come to the conclusion that the opinion of the

learned Judges, delivered in this House, ought to be adopted and acted upon by your Lordships. I say "with some reluctance," because by establishing these leases, and putting that construction upon the power which is necessary to support them, the provisions for the objects of the settlement are or may be defeated. But this consequence, though much to be considered in cases in which the terms of the power are of doubtful construction, cannot be permitted to control powers expressed in words of unambiguous meaning, according to the ordinary acceptation of the terms used; and such, I am of opinion, is the present case. If the exercise of the power given has defeated the intention of its authors, it is much to be lamented. But Courts of Law and Equity can only discover the intention from the terms used, and are not at liberty to speculate upon the possible existence of any intention, not consistent with the plain and obvious meaning of such terms.

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I concur in the opinion expressed by the learned Judges, that the leases in question are justified by the power given, and that none of the objections made to them ought to prevail. The whole question is involved in this opinion, there being no grounds of equity for impeaching the leases, assuming that they are good at law.

The result therefore will be to reverse the decree of the 24th of *June*, 1840, and in lieu of it to dismiss the respondent's bill as against the lessees, and with costs, notwithstanding the difficulties of the case; but of course there can be no costs given upon the appeals.

The order of the 5th of *November*, 1839, was, I think, right.

*Mr. Turner.*—Since the date of the decree in *Ireland*, Lord *Muskerry* has been admitted into possession under

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that decree. I do not know whether it will be necessary to reserve liberty to apply to the court in *Ireland* to restore possession.

*The Lord Chancellor.*—The decree in *Ireland* set the leases aside.

Mr. *Turner.*—It gave possession to Lord *Muskerry*, upon the footing of the leases being set aside.

*The Lord Chancellor.*—Of course, the bill being dismissed, that will fail.

Mr. *Turner.*—I do not know whether your Lordships would think it right to direct that we should be at liberty to apply to the court to direct restoration of possession.

*The Lord Chancellor.*—You do not want special leave for that purpose.

[It was ordered that the order of the 5th of *November*, complained of, be affirmed, and that the decree of the 24th of *June*, 1840, be reversed, and the respondent's bill dismissed as against the lessees, with the costs in the court below; and that the cause be remitted to that court to do further therein as shall be just and consistent with this judgment. See Lords' Journals for 25th of *May*, 1848.]

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|----------------------|---|---|---------------------|--------------|
| JAMES TEMPLETON      | - | - | <i>Appellant.</i>   | 1848         |
| MACFARLANE, BROTHERS | - | - | <i>Respondents.</i> | June 26, 27. |

A patent was taken out for "a new and improved mode of manufacturing silk, cotton, linen and woollen fabrics." The specification, and a disclaimer, subsequently filed under the stat. 5 & 6 Wm. IV. c. 83, set forth that the patentees claimed "the mode hereinbefore described of producing or preparing stripes of silk, cotton, woollen, or linen, or of a mixture of two or more of these materials, in such a manner that the west or lateral fibres of both cut edges of each stripe are all brought up on one side, and into close contact with each other, and the re-weaving of such stripes with the whole fur or pile uppermost, into the surfaces of carpets, &c." It appeared that one of these processes was old. The Judge directed the jury that if one was new, the patent could be supported for the combination of them, and would only be invalid if there had been a public use of both before the date of the patent :

Held that this direction was erroneous, and that the patent was void.

IN the month of *July* 1839, *James Templeton* took out a patent, the title of which was for "Machinery for a new and improved mode of manufacturing silk, cotton, woollen and linen fabrics." In *October*, of the same year, the patentee, under the 5 & 6 Wm. IV. c. 83, amended the title thus :—"A new and improved mode of manufacturing silk, cotton, linen and woollen fabrics." He afterwards instituted a suit against *Macfarlane*, brothers, for an alleged infringement of this patent. The issues sent to trial were framed in the following terms :—"It being admitted, that on or about the 17th of *July*, 1839, *James Templeton*, the pursuer, and *William Quigley*, weaver in *Paisley*, obtained letters patent for *Scotlund*, and enrolled a specification in terms of the proviso contained in the letters patent : Whether, in the course of the years 1844, 1845, and 1846, or any part thereof, and during the currency of

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the said letters patent, the defenders did, at their works, at *Bridgeton*, near *Glasgow*, by themselves or others, wrongfully and in contravention of the privileges conferred by the said letters patent, use a mode of manufacture substantially the same with that which is described in the said specification, to the loss, injury, and damage of the pursuer? Or, first, whether the invention or mode of manufacture described in the said letters patent and specification was known and publicly used within the United Kingdom, prior to the date of the said letters patent? Second, whether the description contained in the said specification is not such as to enable workmen of ordinary skill to practise the invention or mode of manufacture, so as to produce the effects set forth in the said letters patent and specification?"

The issues were tried before Lord *Robertson*, in *August*, 1847 (*a*), when evidence was given by the plaintiff to show that the mode of manufacture was new and useful, that the specification was intelligible, and that by a piece of stuff surreptitiously obtained from the plaintiff's works, the invention had partly got into use before the date of the patent.

The specification was put in evidence, and it appeared that the invention was there described as follows:—"The nature of the said invention consists in weaving fabrics of silk, cotton, woollen, linen, or other fibrous materials, which are to be cut into stripes and used as weft, somewhat in the manner of chenille weft, but with this difference, that the two edges of the stripe shall incline more towards each other, and then weaving such stripes on a ground, so that all the fur or cut edges of the stripes may be brought to the one side, or surface of the fabric, while the other is plain; and which invention is applicable to the manufacture of carpets, rugs, shawls, mats, covers of stools, chairs, or tables, tapestry, or any cloth or

(*a*) Cases in the Court of Session, vol. x. p. 4.

fabric requiring to be raised, so as to have the appearance of velvet, fur, or plush." The specification, as afterwards set forth in disclaimer made under the statute 5 & 6 Wm. 4, c. 38, to disclaim a part of the process which was unquestionably old, described minutely the whole process of manufacture, and concluded thus:—"We declare, &c., that we do not claim as new the machinery or looms with which the fabrics are produced; nor do we claim as new the systematic arrangement of colours, and weaving them in a gauze-web, and cutting the said web up into stripes, and re-weaving the threads, twined or untwined, on being so cut up on another warp, so as to form a regular pattern. And we declare that what we claim as new or improved, and of our invention, is the mode, hereinbefore described, of producing or preparing stripes of silk, cotton, woollen, or linen, or of a mixture of two or more of these materials, in such manner that the weft, or lateral fibres of both cut edges of each stripe, are all brought up on one side, and into close contact with each other; and the re-weaving of such stripes, with the whole fur or pile uppermost, into the surfaces, of carpets, rugs, shawls, or other similar articles, at the same time that a groundwork or platform is woven for the same."

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In his charge to the jury, Lord *Robertson* said, "Now, according to the legal construction of the patent, being one for an improved mode of manufacture, and consisting of an alleged new combination of various particulars with the view of producing a new result, in order to defeat the patent under the issue of prior use, it is not sufficient for the defender to establish that stripes of silk, cotton, woollen, or linen, or of a mixture of any two or more of these materials had heretofore been produced in such manner that the weft or lateral fibres of both cut edges of each stripe were all brought up on one side and into close compact with each other. The proof of such prior mode of producing the stripes, and the public use of



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such stripes, would not be sufficient unless it should also be established that such stripes or weft so produced were publicly used in weaving or reweaving, 'with the whole fur or pile uppermost, into the surfaces of carpets, rugs, shawls, or other similar articles (including therein mats, covers of stools, chairs or tables, tapestry, and any cloth or fabric requiring to be raised, so as to have the appearance of velvet, fur, or plush, as described in the first part of the specification),' at the same time that a groundwork or platform was woven for the same. The proof of the prior use, in order to entitle the defenders to a verdict, must be of the whole mode of manufacture, described and claimed as new, and not of a branch or any part or parts thereof; so that the manufacturing of the weft from the stripes in the manner required, and the public use thereof, without being combined with the weaving or re-weaving in the manner stated, would not be sufficient to invalidate the patent. But on the other hand, the public use of the mode of producing the weft as described, *and* the use of weaving or re-weaving of that weft, as also described and applicable to any cloth or fabric requiring to be raised, so as to have the appearance of velvet, fur, or plush; that is, the proof of these two things being publicly used together, would invalidate the patent, but not the separate public use of each." His lordship, therefore, directed a verdict for the pursuer.

A bill of exceptions to his ruling was presented by the defendants in the following form:—*First*, that his lordship had wrongly directed the jury, in so far as regards the legal construction of the patent and specification; *Secondly*, in so far as his lordship did not direct the jury, that if the mode of producing or preparing the stripes described and claimed in the patent and specification, is proved not to have been of the invention of the patentees, but to have been known publicly and used before the date of the letters patent, the pursuer is not entitled to

a verdict on either of the first two issues, and the verdict ought to be for the defenders on these two issues.

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The case came before the Court of Session on the bill of exceptions, when the Lord President held the ruling of Lord *Robertson* to be correct, but Lords *Mackenzie*, *Fulleton*, and *Jeffrey*, were of a different opinion, and the exceptions were allowed (a). This was an appeal against that judgment.

Sir *F. Kelly* and Mr. *Butt* (Mr. *Webster* was with them) for the appellants.—The decision of the Court of Session is wrong, and the direction of the Lord Ordinary was correct. The claim here is not for the manufacture of a new fabric, but for a new mode of manufacturing an old one; it is for a new combination of the several parts of something, each part of which may have been known before the plaintiff's invention. The novelty in the process is in the mode of combination, and that is all which is claimed in the patent. The parts themselves are not claimed. If there can be a doubt on the words of the claim, the expressions used in the disclaimer must remove it. The plaintiff here does not claim the producing of the stripes, but the mode of preparing or producing them in such a manner that the fibres of the cut edges shall be brought together in a particular way. The claim is for a new combination of old things. Such a claim is good, and a patent for it is valid, when it is plain that that which is old is not claimed, and though in the description what is old may be mixed up with what is new, the patent will be supported. That was the case in *Russell v. Crawley* (b), There a patentee claimed the invention of manufacturing tubes by drawing them through rollers, using a maundril in the course of the operation. A later patent claimed the invention of manufacturing tubes by drawing them through fixed dies or holes, but the specification was silent as to

(a) Cases in the Court of Ses- (b) 1 Crom. Mee. & R. 864.  
sion, vol. x. p. 796.

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the use of the maundril. The court, taking the whole of the latter specification together, held that it would infer that the maundril was not to be used, and so decided that the latter patent was good. *Howorth v. Hardcastle* (a), is to the same effect. That was an action for invading the plaintiff's patent right to certain machinery for drying calicoes, where the specification, after setting forth the mode in which the cloth was to be extended for the purpose of drying, proceeded to state that it might be taken up again by the same machinery. The jury found that the invention was new and useful on the whole, but that the machine was, in some cases, not useful for taking up the cloth; the court, however, refused to set aside the verdict for the plaintiff, and enter a nonsuit. That case was much more unfavorable than the present to the patentee, but that which he did claim having been found to be new and useful, the patent was maintained.

It is perfectly clear that a patent may be maintained for a new combination of old materials. The invention is in the combination, which, if useful and new, will entitle the inventor to protection. In *Hill v. Thompson* (b), Lord Eldon said, "There may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials; but in order to its being effectual, the specification must clearly express that it is in respect of such new combination or application, and of that only, and not lay claim to the merit of original invention in the use of the materials." Here the specification does clearly express what is the new combination, which is the real subject of the claim, and on this authority the patent ought to be supported. The case of *Gibson v. Brandwell* (c), will be relied on by the other side, but the facts of that case shew it to be in-

(a) 1 Bing. N. C. 182; 8 Taunt. 375; 3 B. M. 424.  
 Webs. on Pat. 484. (c) 4 Man. & Gr. 179.  
 (b) 3 Mer. 622, 629; S. C.

applicable to the present. There the action was in case for infringing the patent for "a new and improved process or manufacture of silk:" the third and fourth issues raised the question, whether the alleged invention was a new invention: the jury found specially that it was not a new invention, or a new combination, but that it was an improved process; it was held, that upon these issues the verdict ought to be entered for the defendant. And no doubt such must be the result of the finding which expressly negated the words of the declaration where it alleged the invention to be a new invention. The same observation may be made with respect to the case of *Kay v. Marshall (a)*, for there the patent was for "new and improved machinery for spinning flax," whereas the machinery was old, and the improvement, if any, which was new, was that of an improved maceration of the flax which rendered this old machinery more advantageously available for the purposes of manufacture. But the claim being for a new machinery, which claim was expressly negated by the finding of a jury, the patent of course could not be supported. It is not so here; the claim here is for a new mode of applying things previously well known; the disclaimer limits, restricts, and defines whatever was doubtful in the first claim, and the specification thus explained is good, and the patent must be supported.

Then as to the bill of exceptions. The objections to the charge of the Judge are not sufficiently set out—

(Lord *Campbell*.—What do you mean by the insufficiency of the objections in the bill of exceptions? Do you mean that the party excepting should set forth in the exceptions exactly what the Judge ought to say?)

Certainly. The party is bound, where he complains of omission as well as expression on the part of the Judge, to show what the Judge ought to have stated to the jury. Where exceptions are taken to the directions of the Judge,

(d) 8 Clark & Finnelly, 245.

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it is not enough to state in the bill of exceptions that he declined to direct the jury in the way suggested, without showing what his direction was, and what it ought to have been; *Macalpine v. Mangnall* (a).

Mr. Crowder and Mr. Bethell, for the respondents, were not called on.

The *Lord Chancellor*.—According to the view which I at present take of this case, I do not think it will be necessary to call on the learned counsel on the other side. But as my noble and learned friend, Lord *Campbell*, has just been obliged to leave the house, I shall not propose immediately to dispose of the case, but I shall state my opinion, and my noble and learned friend may afterwards consider whether it appears to him necessary to hear any further arguments in the case.

The point appears to me to be short and simple. There were three issues (in substance, though not perhaps in form,) presented to the jury, and they embrace all the questions between these parties. The first of the issues (which his lordship read) may indeed be said to do so. On that issue there must be a finding in the affirmative, declaring the right to be in the pursuer, and the wrong to be committed by the defendants, or in the negative, denying both of these things. That issue, in fact, embraces the whole question.

Then comes the second issue, and the matter tendered for consideration by that issue is divided into two parts. The question first presented by that issue is, whether the mode of manufacture described in the patent was known in the United Kingdom before the date of the letters-patent. The second question (which is, in fact, the third issue) relates to whether the description in the specification is such as would enable a workman of ordinary skill to execute the process according to the declared purpose of

(a) 3 Com. Bench, 496.

the inventor; whether, in fact, the invention or mode of manufacture is sufficiently explained in the specification.

The bill of exceptions complains that the Judge did not direct the jury, that if the mode of producing or preparing the stripes was proved not to have been the invention of the patentee, but to have been publicly known before the date of the patent, the pursuer was not entitled to a verdict on either of the first two issues, but the defenders were entitled to a verdict on those issues.

The exception raises the substantive question, whether the supposed invention was new; whether, in fact, it was the subject of a patent. The point attempted to be raised upon this, namely, that the party excepting ought to set forth what he thinks the Judge ought to have said to the jury, is a mere technical objection, which cannot be supported. Then what is the question left by this exception? whether the Judge ought not to have directed the jury, that if the mode of manufacture, as proved, could not have been the invention of the pursuer, the verdict ought to be for the defenders. What he did tell the jury was this: "the proof of the prior use, in order to entitle the defenders to a verdict, must be of the whole mode of manufacture, described and claimed as new, and not of a branch or any part or parts thereof." The result of that would be, that if the patentee claimed a process as new, but was only able to show that part of it was new, he would still be entitled to maintain his patent as it stands. Such was the direction of the Lord Ordinary. But the cases show the reverse of this, and it cannot be successfully argued that the law is that which this direction supposes.

But it is said that the parties have not claimed here the invention of all the processes, but only a new mode of applying them. On the real merits of the case the question is, whether the party does not claim as new this mode of preparing the stripes which are to be woven into the substance of the fabric. To answer that question satis-

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factorily, we must look at the evidence, and see what is new and what is old. In the specification the party goes into an elaborate description of the mode of preparing the stripes. If that had been all, the patentee had nothing to do but to state what he used, and the mode in which he used it. He ought to have said that his was a new mode of arranging old materials ; and had he said so, that might have been sufficient to support the patent. But if the party uses such terms as the patentee does here, he states more than he has a right to claim : he says that he claims the invention for weaving “in such manner that the endings are brought up on one side, in close contact with each other, and the re-weaving of the stripes with the whole fur or pile uppermost,” and so on. It does not rest there, for he afterwards states more distinctly what it was that he did claim, by stating what he disclaims, or at least what he does not claim to be new by what he disclaims ; but even that disclaimer (which his Lordship read) shows that he claimed an improved mode of weaving. Now that is not really his claim, and that circumstance alone is sufficient to dispose of the case. I repeat, however, that I will not decide it now, but will communicate with Lord *Campbell* on the subject, and then, if necessary, he will state his opinions to the House. If I am right, the judge at the trial mistook the law in supposing it to be immaterial whether all the invention, or only part of it, was new ; and whether part only being new, the patentee appeared by his specification to claim the whole. In my view of the case, therefore, the direction of the Lord Ordinary was erroneous ; the correction of it by the Inner House was right, and the judgment appealed from ought to be supported.

On the following day the judgment of the court below was (without further observation) affirmed, with costs.

|                                   |                      |                                            |
|-----------------------------------|----------------------|--------------------------------------------|
| Sir THOMAS WILDE and Dame AUGUSTA | } <i>Appellants.</i> | 1848.<br>May 22, 23,<br>and 25.<br>June 6. |
| EMMA, his wife - - -              |                      |                                            |
| MAGNUS GIBSON - - -               | <i>Respondent.</i>   |                                            |

A BILL filed by a purchaser to set aside a purchase and conveyance of an estate, on the ground of fraudulent concealment of a right of way, DISMISSED with costs, there being no proof of concealment by the vendor, although the dealings were inconsistent with any right of way. *Vendor and Purchaser. Completed contract. Imputed fraud.*

To set aside a purchase, perfected by conveyance and payment of the purchase money, for fraudulent concealment by the vendor of a defect in the title, where there was no warranty or statement that there was no defect; proof of concealment by the vendor's agent, is not sufficient, there must be proof of direct personal knowledge and concealment by the principal.

A purchaser of an estate, having made no inquiry respecting the title from an agent for the sale, is not entitled to any relief for non-communication of any defect by him.

Constructive knowledge of an agent, or knowledge acquired by him otherwise than as an agent for the sale, of a fact, the non-communication of which is made the ground for relief against the purchase, does not at all affect the contract.

Constructive notice is resorted to, from the necessity of finding a ground of preference between equities otherwise equal, but cannot be applied in support of a charge of direct personal fraud.

Where a purchaser seeks to be relieved against the purchase on the ground of personal fraud by the vendor, and the alleged fraud is not proved, he is not entitled to relief on any other ground. *Pleading.*



THIS was an appeal from a decree (a) and order of Vice-Chancellor *Knight Bruce*, upon a bill filed by the respondent, for rescinding a contract made by him in *August*,

(a) 2 You. & Col. 542.



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1838, for the purchase of a messuage and land ~~from~~ the appellant, Lady *Wilde*, then *Augusta Emma D'Este*, spinster, and completed by a conveyance and payment of the purchase money in *December* the same year.

The messuage and land in question formed part of an estate at *Ramsgate*, formerly the property of Lady *Augusta De Ameland*, the said appellant's mother, who conveyed it to her in fee in 1829. In *August* 1838, *Mademoiselle D'Este* caused the whole estate to be set up for sale by auction, in lots, for building purposes. Printed particulars and conditions of sale were published: The third condition stated "that a deposit of 20*l. per cent.*, in part of the purchase money, should be paid to the auctioneer at the sale, the purchaser to enter into an agreement for payment of the remainder at the office of Messrs. *Farrer and Parkinson, Lincoln's Inn Fields*, or at the office of *H. Wightwick, Esq., Ramsgate*, on or before the 25th of *March*, 1839, at which time, and at one of those places the purchase is to be completed." The fifth condition was, "that no purchaser should be entitled to require or inspect any title prior to the deeds by which the property was respectively conveyed to the vendor or Lady *Augusta De Ameland* respectively; or to require or inspect the title to any of the respective roads, walks, or pleasure-grounds, or to any of the premises, except the lot or lots purchased by him or her; and that the vendor should not be called upon to identify the respective lots with the former descriptions thereof; and all the recitals and statements contained in any document should be deemed conclusive evidence thereof." The sixteenth was, "that towards effecting an esplanade and steps to the sea, each purchaser should pay 5*l. per cent.* upon his purchase money, into the hands of the said *H. Wightwick*, as a trustee for those purposes."

The last of the lots, which was that purchased by the respondent, was described in the particulars as "The

capital freehold mansion-house, called Mount Albion, with the offices, &c., and pleasure grounds, containing about one acre, two roods, twenty-three perches." And it was added that the purchaser should inclose this lot by a wall or iron railing.

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In a map annexed to the particulars and conditions, the last mentioned lot was described as bounded on the south-west by a new road, called "*Victoria Road*," forty feet wide; and on the east side of that road, next the lot was marked a dotted line, representing the boundary between the liberty or town of *Ramsgate* and the parish of *St. Lawrence*.

The respondent having been declared the purchaser of this lot, at the price of 2,030*l.*, paid the deposit of 20*l. per cent.* to the auctioneer, and also 5*l. per cent.* to Mr. *Wightwick*, in pursuance of the conditions. In the abstract of title, which was soon afterwards delivered to him by Messrs. *Farrer* and *Parkinson*, Mademoiselle *D'Este* was represented to be owner in fee of the premises which were described as adjoining the liberty way, and unaffected by any right or liberty of way over them. The respondent having accepted the title, the premises were conveyed to him by lease and release, dated the 28th and 29th of *December*, 1838. In the release the premises were described as being situate without the liberty of *Ramsgate*, in the parish of *St. Lawrence*, and bounded as they appeared in the map before mentioned. The respondent paid the remainder of the purchase money, and being then let into possession, proceeded to build the wall inclosing the premises, according to the conditions of purchase and to a covenant on his part contained in the deed of conveyance.

In *May* 1839, the officers of the parish of *St. Lawrence* applied to the respondent for payment of two shillings and sixpence, as an annual acknowledgment to that parish

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of a right of way, called "the Liberty Way," through the property on the *Victoria Road* side, within the wall which he had just erected there; and in *January* 1840, the officers of the town of *Ramsgate* applied for the like payment as a similar acknowledgment to their town. They stated that "the Liberty Way" was situated partly within the liberty of the town, and partly in the parish of *St. Lawrence*, and that part of it was in fact included within the newly erected wall. It appeared, on further inquiry that, in the year 1820, Lady *De Ameland* had, with the permission of the officers of the town and of the parish, inclosed so much of the liberty way as passed through her property, and she thereupon executed a deed poll, which recited that the consent of the vestry of the said parish was given to such inclosure, on condition that, during the time the liberty way should be so enclosed, another road, six feet wide, without the enclosure, should be found and maintained by her, and at the expence of her and her heirs; that the part of the liberty way so enclosed should be marked out by proper mark-stones, and that a deed should be executed by her, acknowledging for her and her heirs, that the said liberty way was enclosed by permission, and not of right, and that the same should be opened whenever the said parish vestry should require it, and that by way of acknowledgement a yearly rent of five shillings should be reserved in respect of such enclosed way, payable in moieties to the surveyors of the said town and parish—by all which terms and conditions she (Lady *De Ameland*) declared that she, her heirs and assigns, were bound. It was also ascertained that this nominal rent to the said town and parish had been regularly paid by the agents of Lady *De Ameland* and of Mademoiselle *D'Este*.

The respondent refused to pay the sums so demanded, and conceiving that the value of the property was materially diminished by such a claim, and his enjoyment of it

liable to be disturbed at any time, applied to the vendor's solicitors to take it back, and repay his purchase money, with his costs and other expences. The application was refused.

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The respondent filed his bill against Mademoiselle *D'Este* in 1840, stating to the effect before stated, and further stated, that, until the said rent was demanded of him, he was wholly ignorant that any part of the liberty way was included within the purchased premises, or that the said town or parish had any right of way through any part of them; and the bill charged that the defendant, as well as Lady *De Ameland*, had acknowledged such right of way; that no notice thereof, express or constructive, was given to the respondent, and that from the abstract of title delivered to him, and from the map annexed to the particulars and conditions of sale, it appeared, and he, in fact, believed, that the liberty way was not included within the premises, but adjoined them, and was comprised in the *Victoriu Road*; and he charged that the defendant fraudulently concealed from him the said deed poll, and the fact that Lady *De Ameland* and herself had regularly paid the yearly rents of two shillings and sixpence to the said town and parish, in acknowledgment of their right to the said way; that the premises were represented to him to be wholly situated within the said parish, and without the liberty of *Ramsgate*; and that if he had been aware of the said claim to a right of way, and that the liberty way was included within the premises sold to him, he would not have purchased them.

The bill prayed that the said sale and the deeds of lease and release might be declared fraudulent and void, and that the sale might be set aside, and the deeds delivered up to be cancelled, and that an account might be taken of all sums expended by the respondent in the repairs of the mansion house and the erection of the boundary wall, and of his costs and expences incidental to the purchase and con-

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veyance of the premises ; and that the defendant might be decreed to repay to the respondent the purchase money, and the five pounds per cent. thereon, which he had paid to *Wightwick*, together with what should be found due to the respondent upon the taking of the account for costs and expences, with interest, he offering to account for the rents and profits during his possession of the premises, and to re-convey them.

The appellant, Lady *Wilde*, in her answer to the bill, after admitting the facts before stated, and that Mr. *Wightwick* was her solicitor, and Messrs. *Farrer* and *Parkinson*, her solicitors in *London*, stated that the property forming the estate, part of which was sold to the respondent, had been purchased by Lady *De Ameland*, her mother, from different proprietors, previous to which purchases the appellant believed there existed a way, called "*The Liberty Way*," running from *King's-street, Ramsgate*, in a straight line, in a south-westerly direction, to the sea cliff, but such way was used only by the proprietors of the adjoining lands, which her mother had purchased, and the right of way had thereby become extinguished. And she admitted that in 1820, before her mother had become the sole owner of all these lands, a negotiation took place between Mr. *Daniel*, her solicitor, and the officers of the town of *Ramsgate* and of the parish of *St. Lawrence*, when it was agreed that Lady *De Ameland* should be at liberty to inclose so much of the *Liberty Way* as passed through the property then belonging to her, on payment of two shillings and sixpence annually to the town and parish, by way of an acknowledgement of a right of way ; and she, in pursuance of that agreement, executed the deed poll stated in the bill, but she did so in ignorance of her rights, and the deed was not binding on her or any person claiming under her. And the appellant also admitted that since the year 1830, she had, by her agents,

regularly paid the said nominal rent to the parish and town, as appeared by the accounts furnished to her by her agents; and she did not discover to the respondent or his agents the claim of the town or parish to such rent, but she insisted that there appeared, in the map annexed to the particulars and conditions of sale and on the abstract of title delivered to the respondent, sufficient notice of the liberty way to put him, upon inquiry, into the particulars of it, and that it was not necessary for her to give notice of the deed poll or annual payments of said nominal rents. And she denied all fraudulent concealment on the part of her and her agents, and insisted that the respondent was too late in making his claim, and that if he was entitled to any relief, it was by way of compensation, for that one-half in breadth of the supposed way, if it ever existed in the premises purchased by the respondent, had merged in the *Victoria Road*, a public highway, of which the respondent was cognizant (a).

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A great deal of evidence was given on both sides, the material parts of which, particularly the examination and cross-examination of Mr. *Wightwick*, and Mr. *Allason*, the surveyor, who laid out and mapped the estate in lots for the sale, is stated in the Vice Chancellor's judgment (b). It was clearly proved that there was, at one time, a way called "*The Liberty Way*," traversing the lands forming the estate, before they were purchased by Lady *De Ameland*, and that such way passed near *Mount Albion* mansion, but its course was not accurately defined, nor was it clear what was its width, or whether it passed through the part of the estate purchased by the respondent. In 1820, after Lady *De Ameland* obtained permission to inclose the way, and before she became owner of all the lands, for

(a) For other passages in the answer, see 2 Y. & C. 551, 563. (b) 2 Younge & Col. p. 552 and p. 564.

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which the way was serviceable, the officers of the town of *Ramsgate* and parish of *St. Lawrence*, caused a line of way to be marked out by three boundary stones placed at distances, on what was supposed to be the liberty way," lying along the boundary line between the town and parish. On these stones were cut letters, on one side indicating the town of *Ramsgate*, and on the other the parish of *St. Lawrence*. The way was never used afterwards, nor did it appear that the appellant was at all aware that a way had ever existed, although her agents, in the accounts furnished to her annually, charged five shillings for rent reserved by the deed poll; and from that fact Mr. *Wightwick*, in his evidence, inferred that she knew there was a right of way. It was from his instructions, as agent for the appellant, that *Allason*, the surveyor, understood there was a right of way over the estate, and that the line was marked by stones; and being directed to plan a wide public road on that line, he examined the same with a view of setting out the new road over the same line; and finding the marks on the stones indicating the said parish and township respectively, and understanding that the right of way was claimed exclusively by the town, he concluded that the way passed on that side of the stones which was indicated by the letters, and accordingly he set out a new road, forty feet wide, called the *Victoria Road*, the edge of which coincided with what he supposed to be the boundary line of the parish, believing that it comprehended the whole of the original way, as he intended.

The Vice Chancellor, upon the hearing of the cause in *November* 1843, came to the conclusion that there was a right of way over the lands purchased by the respondents, and that it might be claimed and exercised; and although he, and also the respondent's counsel, acquitted the appellant of all wilful fraud or intention of concealment, he

decreed that the purchase and conveyance were void, and that they should be set aside (a).

In August 1845, Mademoiselle *D'Este* intermarried with Sir *Thomas Wilde*, and they afterwards appealed against the decree, and an order consequential thereto.

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Mr. *Bethell* and Mr. *James Wilde* for the appellants.

There was no fraudulent representation or concealment on the part of the vendor or her agents. The map annexed to the conditions and particulars of sale, showed traces of the liberty way sufficient to put the respondent upon inquiry. He never applied to or asked *Wightwick* any questions about the title, although he was the agent by whose concealment the respondent pretends he was misled. Lady *Wilde*, of herself, knew nothing of the liberty way; but it appears on the map that she gave the public a way, the *Victoria Road*, more than six times the supposed width of the liberty way, which is, or is supposed to be, included in it. The respondent's objection is, that though there is a much larger public way given, the people of *Ramsgate* still have a right at any time to demolish his newly built wall, and claim the old way, which he says lies within it. That is the whole miserable objection to the contract of purchase; and it is made after the contract has been completed by conveyance, and possession taken. Instead of six feet of way, which was the utmost width of the alleged old way, the public have now a way forty feet wide. What benefit could the vendor have from the alleged fraudulent concealment? The evidence does not prove any fraud. The respondent, having in his bill alleged fraud on the part of the vendor, proved, only against her supposed agent, a suppression of a knowledge of the liberty way. He was bound to prove the charge of direct fraud by clear evidence; and the Vice Chancellor under the circumstances, ought to have directed an issue

(a) 2 Y. & Col. 580.



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or action, or to have dismissed the bill, especially when he acquits the vendor of all personal fraud, and puts his judgment on the ground of concealment by her agent. A contract, after it is completed, is not to be set aside for fraud, unless the fraud is personal and clearly proved. All that is proved here is that *Wightwick* knew the boundary stones were not on the margin, but in the middle of the liberty way; and that he, being the agent of the vendor, did not disclose that knowledge to the purchaser. It does not appear that the purchaser ever communicated with *Wightwick*; his communications and dealings as to the title were with *Farrer* and *Parkinson*, who were the proper solicitors and agents for the vendor: and it is not alleged that they had any knowledge of this claim to a right of way. The knowledge *Wightwick* had of it, if any, was acquired by him in 1820, long before he became agent to the vendor. Lord *Hardwicke* held, in *Lowther v. Carlton* (a), that where a counsel or attorney, employed to look over a title, has from some other transaction notice of a defect, that shall not affect the title. The observations of the Lord Chancellor and Lord *Brougham*, in *Attwood v. Small* (b), form a digest of the law on this subject. The principles so admirably laid down in that case, and in *De Beauvoir v. Rhodes*, which is reported in a note to it, apply so emphatically to this case as to render it almost unnecessary to offer further argument. (The passages referred to below were read.)

The position that the principal is answerable for the concealment and misrepresentation of the agent, is fully discussed by the Barons of the Exchequer, in *Cornfoot v. Fowke* (c), and by Lord *Denman* in *Fuller v. Wilson* (d); in both which cases it was held that the principal was not answerable for the misrepresentations of the agents—

(a) 2 Atk. 242.

(b) 6 Clark & F. 232, (see pp. 350, 393, 444, 448.)

(c) 6 Mee. & W. 358.

(d) 3 Queen's Bench, 58 and again at p. 68.

[Lord *Campbell*.—In an action upon contract, the representation of an agent is the representation of the principal; but in an action on the case, for deceit, the misrepresentation or concealment must be proved against the principal.]

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That distinction entirely supports the case of the appellant. The purchaser here, in fact, knew as much of the circumstances of the property as the vendor did. The knowledge acquired by the agent, not as agent in the sale, but from antecedent transactions, is not to be imputed to the principal; *Worsley v. The Earl of Scarborough* (e). [*Pickering v. Dowson* (f), *Pasley v. Freeman* (g), *Haycraft v. Creasy* (h), *Polhill v. Walter* (i), *Levy v. Langridge* (j), *Moens v. Hayworth* (k), and *Evans v. Collins* (l) were cited, among other cases, to show that a knowledge by the principal and a guilty misrepresentation or concealment, were essential ingredients to fraud.] The bill here made a case of direct immediate knowledge, in the vendor, of the right of way; the evidence only proved constructive knowledge: the bill alleged personal knowledge and fraudulent concealment; the case proved was one of constructive concealment, and *Wightwick's* evidence, which alone attempts to support that case, is not positive, but inferential and conjectural. The evidence in support of his agency for the vendor, is far from being conclusive; there is not a tittle of proof that he was a solicitor for the sale, or that he ever interfered in it. The Messrs. *Farrer* and *Parkinson* were the solicitors. It would be a violation of every principle of equity to hold *Wightwick* the agent, and then fix the principal with his previously acquired knowledge and with his concealment.

(e) 3 Atk. 392.

(f) 4 Taunt. 779.

(g) 2 Smith's L. Cases, 71.

(h) 2 East 92.

(i) 3 Barn. & Ad. 334.

(j) 4 Mee. & W. 338.

(k) 10 Mee. & W. 147.

(l) 5 Q. B. 804, 820.

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If a case has been made to entitle the respondent to any relief under his bill, it is a case of compensation, which the vendor's agents offered, but the respondent rejected.

Mr. *Swanston* and Sir *F. Kelly* for the respondent.

[*Lord Campbell*.—It appears that in the argument in the Court below, and in the judgment there, the defendant was entirely absolved from all blame : Are we to assume that here ?]

Certainly, the Vice Chancellor absolved the lady from personal fraud. We mean to argue the case with all possible respect for her ; but we do not admit a want of personal knowledge of the right of way as widely as her answer put it.

They then read passages from the evidence, bearing on the point, to show, first, that there was no doubt at all of the existence of a public way over the property ; whether it was a carriage way or foot path, was not material to the case. If the stones laid down with the initials of the town of *Ramsgate* and the parish of *St. Lawrence* were in the centre of the liberty way, as the evidence showed, then it was clear that the wall 'built by' the respondent, under the direction of the vendor's surveyor, on what he was told was the boundary of his property, was an encroachment on the way, and liable to be pulled down, the way never having been legally stopped. If the old way was six feet wide, and there is now only the width of three feet outside the wall, it is competent to any inhabitant of *Ramsgate*, and to the public generally, to complain of the encroachment. The property was sold free from all right of way, yet a right of way is now claimed, and the vendor admits its existence formerly, and does not show that it was legally stopped. Has not the purchaser, therefore, a right to be relieved from his contract ?

[*The Lord Chancellor*.—The contract of purchase is perfected by a conveyance. To be relieved against that,

fraudulent concealment must be proved. This is different from a bill by the vendor for specific performance of the contract (a).]

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The purchasers' bill to set aside the executed contract in *Vigers v. Pike*, was dismissed, there being long acquiescence in the purchase, after knowledge of the fraudulent representations of the vendors. Here the complaint was made as soon as the right of way was claimed. The dealings between this purchaser and the vendor, or her agents, and the representation of the latter, were inconsistent with any right of way over the property. The vendor must be assumed to have known the existence of a way, from her possession of the deed poll, executed by her mother in 1820. At all events, it is proved that her agent, *Wightwick*, was aware of the right of way. There is, as has been observed, a difference between the evidence necessary to support an action of deceit, and evidence of fraud necessary to set aside a contract in a Court of Equity. Suppose the vendor had herself been a party to the deed of 1820, she would be clearly guilty of fraud in equity. Representations made by a party, inconsistent with personal knowledge, are, for the purposes of this suit, a fraud, although the knowledge may not be present in the mind of the party at the time of making the representations. So whether the knowledge of this right of way was present or not to the mind of the vendor at the time of the representations made by her or her agent, she, having the knowledge, and not communicating it to the purchaser, was guilty of a fraudulent concealment, in equity. The cases which will be cited go to that extent. How can she be absolved of the knowledge of the way, when her agent made the annual payments in acknowledgment of it, and she admits she noticed the charges in the agent's accounts, especially when she had in her possession the deed under which the pay-

(a) See *Vigers v. Pike*, 8 Clark & Fin. 646.

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ments were made? *Wightwick* swears that "she knew the payments were made by him on her behalf, in acknowledgment of the right of way."

No corrupt motive or moral turpitude is imputed to the vendor, but the case is, that she sold this property exempt from any right of way, and now, when the right is claimed and established, she is found to have known, or to have had the means of knowing, that the right of way existed. This case falls within that of *Edwards v. M<sup>c</sup>Leay (a)*.

[*Lord Campbell*.—That was a case of direct fraudulent suppression. But is there any case of a contract completed, being set aside for non-disclosure of mere constructive knowledge; for no more than that is proved?] The evidence shews, and the vendor herself admits in her answer, that *Wightwick* was her agent. He knew of the right of way, and of the deed of 1820; he paid the annual rents on behalf of the vendor, and she knew it. There was such misrepresentation or suppression of knowledge as constitutes fraud, quite sufficient, in the view of Courts of Equity, to set aside contracts, even after they are completed. In *Fuller v. Benett (b)*, Vice Chancellor *Wigram* states the principles on which a vendor is affected with the knowledge of his solicitors. "It is clear that a purchaser may be affected with notice of what the solicitor knew as solicitor of the vendor" (he being solicitor for the purchaser also) "although as solicitor for the vendor, he may have acquired his knowledge before he was retained by the purchaser. Whatever the solicitor, during the time of his retainer, knows as solicitor of either party, may possibly, in some cases, affect both, without reference to the time when his knowledge was first acquired."

[*The Lord Chancellor*.—Admitting that *Wightwick* made the payments in acknowledgment of the right of way under the deed of 1820, and that he was the agent of the

(a) Coop. 308; 2 Swanst. 287. (b) 2 Hare, pp. 403-4.

vendor, that fixes her with no more than constructive notice of the way.]

But she had, also herself, knowledge of the right of way, from the deed executed by her mother, the former owner of the property, and from the payments charged in the accounts. The case made by the respondent is fully sustained by the doctrines laid down by Sir *W. Grant* and by Lord *Eldon*, in *Edwards v. M'Leay* (a). The observations also made by Lord *Lyndhurst* in *Small v. Attwood*, in the Court of Exchequer (b), and by him and other noble and learned lords upon the appeal to this House (c) in that case bear strongly upon the material points in this; the nature of the agency of *Wightwick*, and his knowledge, and the knowledge of the vendor. [The passages below referred to in the reports of the two cases were read at length; and the following cases at law were cited and applied: *Medina v. Stoughton* (d), *Hern v. Nicholls* (e), *Lisney v. Selby* (f), *Tapp v. Lee* (g), *Doe v. Martin* (h), *Schneider v. Heath* (i), *Dobell v. Stevens* (j), *Early v. Garrett* (k), *Foster v. Charles* (l), *Corbett v. Brown* (m), *Polhill v. Walter* (n), *Freeman v. Baker* (o), *Cornfoot v. Fowke* (p), *Moens v. Hayworth* (q), *Fuller v. Wilson* (r), *Evans v. Collins* (s), and *Humphreys v. Pratt* (t).]

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| (a) Coop. p. 311, <i>et seq.</i> ; | (k) 9 Barn. & Cr. 928.      |
| and 2 Swanst. p. 289.              | (l) 6 Bing. 396; see also 7 |
| (b) 1 Younge, 407; see pp.         | Bing. 105.                  |
| 460-1-2 and 480, <i>et seq.</i>    | (m) 8 Bing. 33.             |
| (c) 6 Cl. & F. pp. 395, 330,       | (n) 3 Barn. & Ad. 114.      |
| 393, and 444.                      | (o) 5 Barn. & Ad. 797.      |
| (d) 1 Salk. 210.                   | (p) 6 Mees. & W. 358.       |
| (e) <i>Id.</i> 289.                | (q) 10 Mees. & W. 147.      |
| (f) 2 Ld. Raym. 1118.              | (r) 3 Q. B. 58, 68, and     |
| (g) 3 Bos. & Pull. 347.            | 1009.                       |
| (h) 3 Term Rep. 39.                | (s) 5 Q. B. 804, 820.       |
| (i) 3 Camp. 506.                   | (t) 2 Dow. & Cl. 288;       |
| (j) 3 Barn. & Cr. 623.             | 5 Bligh. N. S. 154.         |

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It was contended in the court below that the defect in the title, in consequence of the claim to a public way was a fit ground for compensation : It might be so, if the purchase had not been of a mansion-house, with out-houses and pleasure ground only, the privacy and comfort of which were invaded by a public way. No reduction of the purchase money could compensate the respondent for such an annoyance ; the contract should be set aside altogether.

Mr. *Bethell* in reply, again contrasted the pleadings of the respondent with the proofs, and referring to the allegations of personal knowledge and fraudulent concealment in the bill, shewed that they were most directly denied in the answer. It is a well established rule in equity, that if a plaintiff forces a party to answer a charge upon oath, the latter is entitled to all the benefit of such an answer in denial of the charge, unless the charge is proved by the evidence. Here the denial by answer was complete and there was not a particle of proof to support the charge.

There was a case of *Fuller v. Benett* cited for the respondent, but the judge's observations referred to in that case, which is itself wholly irrevelant to this, appear to be entirely in favour of the appellant. He submitted that the decree should be reversed, and the bill dismissed with costs.

The *Lord Chancellor* observed that there was a case of *Legge v. Croker*, 1 *Ball & Beatty*, not cited on either side, though it appeared to him to be remarkably similar to the present case.

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The *Lord Chancellor*.—The bill in this case prays that the conveyance may be set aside as fraudulent ; but the decree, although it sets aside the conveyance, departs from the usual course in such cases, and abstaining from any imputation of fraud, declares that under the circum-

stances the contract was void, and, as a supposed necessary consequence, that the conveyance ought to be cancelled. This is not an immaterial circumstance, as it strongly implies that the Vice Chancellor was satisfied that the evidence did not establish any case of fraud. If that be so in fact, the first question will be, whether, upon a bill framed, as the bill in this case is, a decree can be supported upon any other ground than the case of fraud distinctly charged by the bill.

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It is in all cases important to consider how far the case proved is in conformity with the case alleged; but it is peculiarly so in cases founded upon alleged fraud, imputing dishonest practices to the defendants. It is in all such cases essential to prevent the proceedings from becoming instruments of unfounded slander. Plaintiffs should bear in mind that imputations which cannot be supported, will not only not profit them, but may debar them from that relief to which they might be entitled upon other grounds, if properly brought forward.

The bill in this case imputes direct fraud, consisting in this, that the defendant, at the time of the sale, knew the contents of the deed of 1820—that the liberty road passed over the portion of land purchased by the plaintiff—and fraudulently concealed from the plaintiff the knowledge of that deed, and of that fact. The payment of the two and sixpence to the parish of *St. Lawrence* and to the liberty of *Ramsgate*, is not charged as amounting to a knowledge of the road, but only as evidence of knowledge of the deed.

The fraud imputed is personal and direct; but the language of the decree abstains from affirming any such case, and the Vice Chancellor in his judgment disclaims any intention of supporting the decree upon the affirmative of such imputation, which was indeed impossible, the truth



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of such imputation having been distinctly disproved by the evidence on both sides. The deed of 1820 never was in the possession of the defendant, and there is not only no proof of her having had any knowledge of the deed or of its contents, before the sale and conveyance was made to the plaintiff, but the contrary is clearly proved, and no attempt is made to establish such alleged knowledge.

If, therefore, the case proved had been such as, upon a proper bill for that purpose, would have entitled the plaintiff to the relief prayed, the frame of this bill would probably have been a sufficient answer to the claim to such relief as this seeks. The decision upon this appeal does not, however, in my opinion, rest upon that ground. The case alleged might have been sufficient to entitle the plaintiff to relief, if it had been proved; but the case proved would not have been sufficient for that purpose, though properly alleged.

The result of the evidence is simply this: that there was, prior to the year 1820, a right of way passing through the land, belonging to Lady *Augusta De Ameland* towards the sea; but the particular line of the way was not at that time ascertained. In that year the officers of *St. Lawrence* and of *Ramsgate*, assuming that the way followed the boundary between the parish and the liberty of *Ramsgate*, and consequently that the centre of the way was the true boundary, put up three stones, marking out that line, and, if they were correct in their supposition, the land sold to the plaintiff, abutting upon the line of those stones, would comprise within itself one-half of such way, the width of which, however, is left uncertain. But that depends entirely upon the correctness of the supposition that the centre of the way was the real boundary, which the evidence proves to have been very doubtful, the precise line of way over land then unenclosed

being at that time incapable of being perfectly ascertained. That the centre of the way and the boundary line had been considered as identical, depended upon what had taken place in 1820, of which the defendant had no knowledge. The deed of 1820, if the defendant had known its contents, would not have informed her of this, nor would the payment of the two sums of two shillings and sixpence each; for although from both it might have been inferred that in some point the way touched upon land in the liberty and in the parish, neither would show that it touched upon both, at that point of the plaintiff's land; and as to these payments, I must observe that there is not sufficient evidence that the defendant knew that such payments had been made, and none that she knew for what they were made. Mr. *Wightwick* indeed proves that he paid these sums as agent or manager for the defendant, and that he entered such payment in her accounts; but such accounts were not proved or produced in evidence, and there is, therefore, no proof of the manner in which such payments were entered, and unless such entries had specified that the payments to *St. Lawrence* were made in respect of the right of way running over the land bought by the plaintiff, they would not have given any information as to the fact of which the plaintiff complains.

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It is true that the deed, if it had been in the possession of the defendant, and the payment, if known to her, might have amounted to constructive notice, being sufficient to put a party upon inquiry. The effect of constructive notice in cases where it is applicable, as in contests between equities of innocent parties, is sufficiently severe, and is only resorted to from the necessity of finding some ground for giving preference between equities otherwise equal: but this is the first time I ever knew it applied in support of an imputation of direct personal fraud and misrepresentation. The two things cannot exist together—there can be no direct personal fraud without intention, and there can

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be no intention without knowledge of the fact concealed or misrepresented; and if there be knowledge, the case of constructive notice cannot arise; it would be absorbed in the proof of knowledge.

It must be observed that there is not in this case any misrepresentation or statement in the nature of a warranty—the utmost that has or can be alleged is that there was a dealing with the property, particularly with respect to the covenant to build a wall, inconsistent with there being any right of way—but no statement or warranty that there was not a right of way, a distinction important to be borne in mind, when this case is compared to actions for deceit; in which, under such circumstances, the *scienter* is the essence.

An attempt was made to affect the defendant with all the knowledge which Mr. *Wightwick* possessed upon the this subject; but that attempt failed, for many reasons. In the first place, although he was the agent of the defendant for certain purposes connected with the sale, it does not appear that the purchaser had any communication with him respecting the purchase, except in paying a stipulated per centage towards the expences of a terrace walk. The whole transaction of the purchase was conducted in *London*. The documents preparatory to and connected with the purchase may have been prepared by Mr. *Wightwick*; but when prepared, they became the representations of the vendor, and what knowledge the person may have had who prepared those documents is immaterial. He may have been guilty of neglect towards his employer in permitting the preparation and use of inaccurate papers on her behalf, but not having had any personal communication with the purchaser, the latter cannot complain of having been deceived by any misrepresentation made by him. It is, however, clear that Mr.

*Wightwick* himself cannot, as between these parties, be considered as having more than constructive notice of the fact alleged by the plaintiff. What knowledge he acquired in 1820, is immaterial; as, at that time, he was not acting for the defendant or for Lady *Augusta De Ameland*, and although he, after he became their agent, paid the two shillings and sixpence to *St. Lawrence* and *Ramsgate* for the defendant, such payment would only show that some right of way had been supposed to pass over some part of the land in each of those districts, but could only be constructive notice of its affecting the plaintiff's land.

It must also be observed, that if the plaintiff had relied upon any supposed fraud or misrepresentation on the part of Mr. *Wightwick*, he was bound so to have stated his case; and he cannot be permitted to support an alleged case of personal and direct fraud by a principal, by proving misconduct in an agent not named in the bill for that purpose.

If, therefore, the right of way complained of by the plaintiff had been proved—which it is not—and if the case relied upon had been properly stated in the bill—which it is not—the case would have come to this, that the defendant had no knowledge of the fact complained of, but had within her reach means of such knowledge. That is constructive notice of a fact, not consistent indeed with the mode of dealing with the property, but as to which no representation of any kind took place. And the question would arise whether such circumstances would entitle the purchaser to have a completed purchase set aside. It has not been, and cannot be, contended that it could; but attempts were made to support the decree upon arguments resting, as it appeared to me, upon a supposition that there might be direct personal fraud, consistent with perfect freedom from any personal blame or misconduct.

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The direct personal fraud was attempted to be supported by some expression in Mr. *Wightwick's* deposition, in which he says that the defendant had knowledge of the right of way claimed over the land purchased by the plaintiff; but he does not say how he proved such knowledge, and, coupled with what he said respecting the deed and the payments, he must be understood as intending to say that the defendant must, as he supposes, have known of the claim, from the fact of such deed having been executed, and such payments having been made.

Finding that there was no evidence to support the charge of direct personal fraud imputed by the bill, and that the evidence, at most, only raised a case of constructive notice of the fact complained of by the plaintiff, I waited with some curiosity to learn the ground or authority on which the decree was to be supported. The case principally relied upon was *Edwards v. M'Leay (a)*; but that case cannot assist the respondent, for in that case there was knowledge in the vendor, and a false representation, both of which are wanting in the present case. Lord *Eldon* says (*b*), "I agree with the Master of the Rolls that if one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, this Court will rescind the contract." A case much more in point is that of *Legge v. Croker (c)*, in which the lessor had assured the lessee that there was no right of way over the ground; that there had been formerly, but that it had been legally stopped by a grand jury presentment forty years before. It turned out that there was a footway, the presentment applying only to a carriage way, and the lessee was convicted for obstructing it, whereupon he filed his bill to be relieved

(*a*) Cooper, 308., and 2 Swanston, 287.

(*b*) 2 Swans. p. 289.

(*c*) 1 Ball & B. 506.

from the lease ; but Lord *Manners* dismissed his bill, saying, “ If there were a wilful misrepresentation, the plaintiff might be entitled to relief, but the lessor conceived himself entitled in point of law in asserting that there existed no right of way ; it cannot be called a misrepresentation.” That was a much stronger case against the lessor than the present is against the vendor.

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The result appears to me to be, *first*, that the plaintiff, having rested his case in the bill upon imputations of direct personal misrepresentation and fraud, cannot be permitted to support it upon any other ground ; *Secondly*, that the evidence, at the most, proves only constructive notice of the fact, upon the non-communication of which the plaintiff founds his claim for setting aside his completed purchase ; and that nothing short of positive knowledge can be sufficient for that purpose. The case alleged is not proved, and the case proved is not alleged ; and if it had been, would not have been sufficient to support the decree.

The conclusion to which I have come is, that the decree ought to be reversed, and the bill dismissed, with costs.

Lord *Brougham*.—I entirely concur with my noble and learned friend in the conclusion to which he has arrived, being clearly of opinion that the case alleged has not been proved, and that the case which has been proved is not sufficient to support the prayer of the bill, to have the indentures of lease and release, the conveyance, given up and cancelled on the ground stated in the bill and assumed in the decree.

There cannot be anything more vague than the allegation of fraud that is to be found in the pleadings, and what my noble and learned friend has most justly observed is a principle of the highest importance to be kept in view in proceedings in Equity,—for the security of the Court against

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imposition upon it,—for the keeping straight and clear the principle upon which its jurisdiction is to be exercised,—for the safety of the characters of the parties—and for common justice. My noble and learned friend has next observed, that where fraud is to be the ground of the proceeding, and is made the principle on which the relief is sought at the hands of the court, that fraud must be clearly and distinctly alleged, and if so alleged, must equally be clearly and distinctly proved, if it is the ground on which parties seek the assistance of the court for equitable relief. That fraud, in this case, is clearly alleged, there can be no doubt whatever, because we find in the bill this allegation, “that the said *Augusta D’Este*, that is to say, the defendant, at the time of the sale to the plaintiff, well knew that the said deed poll had been made and executed by her mother, the said Lady *Augusta De Ameland*, that is to say, well knew, that the said liberty-way so claimed in the township of *Ramsgate* and the parish of *St. Lawrence* was included within the premises so sold to your orator as aforesaid.” That is distinctly alleged: but then nothing of the kind has been proved. Has anything been adduced as a substitute for that proof? Nothing of the kind. It is no question of constructive notice; for, as my noble and learned friend has well observed, constructive notice merges in actual knowledge. Constructive notice is only where actual knowledge is not alleged; and here there is actual knowledge alleged, and thus no question as to constructive notice can arise.

Now, though it may not have been proved that the defendant actually knew of the deed poll, though, on the contrary, it may have been proved that she had not actual knowledge of it, yet by way of substitute for the first allegation, they as much as say, “If we cannot charge you with knowledge of the concealment of the deed poll, we will charge you indirectly, we will charge you by infer-

ence." In the next paragraph of the bill they go on to state, "That the said *Augusta Emma D'Este* had, in fact, by her agents, regularly paid the nominal rent reserved to the said township of *Ramsgate* and parish of *St. Lawrence* by the said deed poll, as an acknowledgement of their right to re-open the said liberty way, for several years prior to the said sale to your orator," that is to say, "paid by her agents two shillings and sixpence in respect of the way for several years prior to the said sale to the plaintiff." Now, in the first place, it is not proved that the accounts in which it is said the two shillings and sixpence paid by the agent was entered, ever did contain that entry; for the accounts were not produced. In the next place, it is not proved that she had that knowledge; therefore in order to prove her knowledge, you must assume three things, *first*, that she knew of the accounts, which she did not know, but the contrary; *secondly*, that the accounts contained the entry; and *thirdly*, in order to make it the least available to the case towards proof of knowledge and suppression of that knowledge, you must go a further step, and prove that the accounts, if produced, and if seen by her, did contain, not only the entry of the payment of two shillings and sixpence by the agent, but also an entry that the two shillings and sixpence was paid in respect of that right of way to the parish of *St. Lawrence*. It is ridiculous to suppose that you can make all these assumptions in a court where the foundation of the whole claim is fraud, alleged by the concealment of a fact well known.

In one part of the argument a reference was made to the deposition of one of the witnesses: it was, in the cross-examination of Mr. *Wightwick*, the defendant's witness, and it was said that that went to prove the case alleged by the plaintiff; but, as my noble and learned friend has observed, when you come to look at the question, it turns out that the question by the reference to the last antece-

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dent, does not mean what it was alleged to have meant—the position of the way in the parish, and did not therefore refer to the substance of the answer, and consequently there was nothing whatever in that answer to touch the case.

In the case of *Edwards v. M'Leay*, both the learned judges, Sir *W. Grant*, and Lord *Eldon*, went on the fact, that there was direct knowledge brought home to the party. That case, therefore, does not help the plaintiff in this case; it does not apply here; but the case which my noble and learned friend happened to light upon, but which had not been mentioned at the bar, does apply. I do not remember, in the course of my experience, ever to have seen two cases more nearly alike than that case and the present. There is a singular coincidence; if you change the names, they are almost the same cases; though I must observe that it did not require a case of this sort to enable us to arrive at the conclusion at which we now arrive. In the present case there is, first, a total failure in proof of the case alleged; and secondly, the case which is proved is totally insufficient to support the claim.

It is singular to observe how very different the view taken here of the proof of fraud and of the import of it, and its tendency towards a remedy is, from that which is taken in the Courts of Common law, in the celebrated case of *Pasley v. Freeman* (a), but particularly the case of *Haycraft v. Creasy* (b). There you find that the knowledge was never alleged; but if you look at that case—which is celebrated by its having shown a rarely occurring difference of opinion between the learned Chief Justice, Lord *Kenyon*, and the three puisne Judges, they having decided against Lord *Kenyon*, that the action would not lie—it is singular how clearly you find that the plaintiffs did not allege a *scienter* there; they allege things which might be supposed

(a) 3 T. Rep. 51.

(b) 2 East, 92.

to amount to a *scienter*, but they never dared to allege a *scienter*. They said that *Creasy* had given intimation to *Haycraft* that his opinion was, that Miss *Robertson*, who turned out to be a swindler, was perfectly solvent, and that he of his own knowledge asserted in words that she was solvent, and that she might safely be trusted to any reasonable amount with goods; and so it was argued that there was a *scienter*; but the pleader, who drew the declaration, knew a little better than that. He was afraid that that would be held only to be a *scienter* of an opinion, and that it amounted only to an opinion; and so the court held. They said we must have knowledge alleged of a fact; but what the party was talking about was not of a fact, but merely of an opinion, viz., the solvency of the lady. The pleader was quite aware that that objection would be raised against him, and accordingly he took special care not to allege the *scienter*; and it is expressly stated in the report that no knowledge was alleged in the declaration, but it was only alleged that the party had given a false representation.

Now what would have been the consequence if he had alleged knowledge? He would have done what the pleader in equity has done in this case in the passage which I have read to your lordships; he would have alleged that the said *Creasy* well knew the same, but then he would have been obliged to prove that, and as he could not prove it, of course he would have been nonsuited; he therefore took care not to allege it, and he left it to be a matter of implication.

I am therefore clearly of opinion that there has been as great a miscarriage of justice in this case in the court below as I have ever seen, and I am sorry for it, because there is a great proportion, I am afraid I ought to say a great disproportion, between the value of this question and the expenses incurred in litigating it, and I am sorry that our jurisdiction does not enable us to do more than to

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give to the defendant, the appellant before us, the costs in the court below. It is otherwise in other courts, as my noble and learned friends, who have attended the Privy Council, well know. It is totally different in the Ecclesiastical Court, and the Admiralty Court, and those extensive jurisdictions which are exercised by many of our colonial courts; and I must say that I hope to see, among other improvements of our practice, a little relaxation of that principle as regards the costs in equity cases. Costs at law stand on a different ground, but costs in equity are mere creatures of practice, and out of statute; they are more in the discretion of the court, and therefore I hope to see some such remedy adopted as will prevent the grievance of which the appellant has a right to complain: for after she has got the decree reversed by our judgment; after she has got the costs below given by the reversal of the decree, she will still be left burdened with her own costs of this appeal, which I am afraid bear a considerable proportion, if not a great disproportion, to the whole value of the matter in dispute.

With this expression of a clear opinion, that the decree cannot stand, that it must be reversed with all the costs below, I entirely concur with my noble and learned friend in the motion that he has made.

*Lord Campbell.*—My Lords, after the very attentive and anxious consideration which this case has received, I have come to the clear conclusion that the decree appealed against ought to be reversed; and I must say that in the court below the distinction between a bill for carrying into execution an executory contract, and a bill to set aside a conveyance that has been executed, has not been very distinctly borne in mind.

With regard to the first: If there be, in any way whatever, misrepresentation or concealment, which is material to the purchaser, a court of equity will not compel him to

complete the purchase; but where the conveyance has been executed, I apprehend, my Lords, that a court of equity will set aside the conveyance only on the ground of actual fraud. And there would be no safety for the transactions of mankind, if, upon a discovery being made at any distance of time of a material fact not disclosed to the purchaser, of which the vendor had merely constructive notice, a conveyance which had been executed could be set aside.

Now, my Lords, the counsel on the part of the respondent acquiesced in the view that this was to be considered as if it were an action of deceit; but they argued that an action of deceit might be maintained without proof of actual fraud. From that position I entirely dissent. If you mean by *fraud*, an intention to injure the party to whom the representation is made, or to benefit the party who makes the representation, there may be an action of deceit without fraud; but there must be falsehood: there must be an assertion of that which the party making it knows to be untrue; the *scienter* must either be expressly alleged, or there must be an allegation that is tantamount to the *scienter* of the fraudulent representation, and this allegation must be proved at the trial. If your Lordships will examine the cases that have been referred to, of *Foster v. Charles* (a), *Polhill v. Walter* (b), and *Corbett v. Brown* (c), you will find the judges uniformly lay down the rule that there must be a falsehood stated and proved. If that falsehood is stated without any view of benefiting the person who states the falsehood, or of injuring the person to whom the falsehood is stated, in one sense of the word you may say it is not fraudulent, but it is a breach of a moral obligation; it is telling a lie; and if a lie is told whereby a third person is prejudiced, although there may be no profit to the person who tells it, and although no injury was intended to the

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(a) 7 Bing. 106. (b) 3 B. & A. 123. (c) 8 Bing. 37.

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party to whom it is told, but a benefit to a third person, it is clearly a breach of moral obligation, and is a fraud which will support an action of deceit.

Now, my Lords, what evidence is there to support such an action? The bill is framed, I may say, *ex delicto*, not *ex contractu*; but it asserts, in the most positive manner (and that is the foundation of the relief which is prayed), that the defendant, at the time of the sale, not only knew of the deed of 1820, but knew of the direction of the "liberty way," and knew that "liberty way" came upon the ground which was sold to the plaintiff. Now, my two noble and learned friends who have preceded me, in the clearest manner have shown that there is not a particle of evidence to support that allegation, and I do not mean to trouble your Lordships by again going through the evidence. Indeed, there has been every desire to conduct a case of this sort with the courtesy and respect to the parties which were indicated in the court below and at the bar here: I will not strictly interpret the disclaimer at the bar, but the learned Judge below, judicially, more than once, said that he acquitted the parties of all fraud:—therefore the notion of this bill being supported on the ground of personal fraud committed by the defendant, must at once be dismissed. That being the case, in the shape in which the bill is presented before us, the case of personal fraud committed by her entirely fails, and we are not at all called upon to consider whether the case of *Cornfoot v. Fowke* in the Exchequer was rightly decided or not, in which the judges were divided as to whether the fraudulent representation of an agent was equivalent to a fraudulent representation by the principal. Here the case alleged is a fraudulent representation by the principal, and not by an agent.

But, my Lords, in the first place, there is no evidence to which we are at liberty to pay attention, to prove that

*Wightwick*, in making the representation at the time of the sale, was the agent of Lady *Wilde*, and if he was the agent, there is no evidence whatever that he, in the course of the agency acquired any knowledge, or at any time had any knowledge of the direction of the road, and on that the whole turns, because the mere knowledge of the liberty way is nothing, and the mere knowledge of the deed of 1820 is nothing, unless he in the course of his agency acquired a knowledge of the direction of the liberty way, and knew that part of the liberty way extends within the wall which was erected by the plaintiff. The knowledge then amounts to nothing; he had no knowledge which would show that he was guilty of any fraudulent misrepresentation. Therefore, my lords, in the light in which I view this case, it seems to me that the decree cannot be supported.

With regard to the case of *Edwards v. M'Leay*, I most reverentially regard it. I think there is no case of higher authority to be found in our law books. It was decided by Sir *Wm. Grant*, on the most unexceptionable principles, and it was supported by my Lord *Eldon*, and he in the most pithy manner states the principle on which he proceeded. This is the principle on which he acts: "If one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, this court will rescind the contract."

Now, my lords, this is the first case that we have cited before us, or to be found, of a bill in equity to set aside such a transaction, and we have as yet no authority to go further than *Edwards v. M'Leay*. That is the guide on one side: then what is the guide on the other? The case decided by Lord *Manners*, a judge of very great experience and very great intelligence, whose opinion on such a question is to be regarded with high respect—that case is the guide on the other side, to show you what you ought to avoid. You may go so far as *Edwards v. M'Leay*; but

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then you are told how far you are not to go by the warning in the other case.

For these reasons, I am clearly of opinion that this bill ought to have been dismissed, with costs; and that is all that can be given to the defendant, on whom some hardship is thrown, but of course that is a hardship which, under all the circumstances, must be suffered, for we cannot give her the costs of the appeal.

*Mr. Bethell.*—We have been compelled to pay the costs in the court below; they must be returned, and probably your Lordships will add to your order what you did under the same circumstances, in *Attwood v. Small (a)*.

*Lord Brougham.*—Our judgment is that the bill, instead of leading to the decree cancelling the conveyance, ought to have been dismissed with costs; consequently, if any costs have been paid in the court below by the appellant, they must be repaid.

*Mr. Bethell.*—The order of the House in *Attwood v. Small*, was that the bill be dismissed, with costs, and then there was a reference to the court to carry that direction into effect. I only want the same words as in that case. Your Lordships did the same in the case of the *Stockton and Darlington Railway Company v. Barrett (b)*.

[It was ordered that the decree of the 5th of *December*, 1843, and an order of the 25th of *March*, 1845, be reversed, and that the costs directed by the said decree be repaid to the appellants, and that the bill in the court below be dismissed with costs, including the costs of the proceedings under the said decree and order, except the appellant's costs of exceptions to the master's report, as to which each party was by consent to bear their own costs. And it was further ordered that the cause be remitted to the Court of Chancery to do therein as shall be just, &c.—See *Lords' Jour.* for the 6th of *June*, 1848.]

(a) See 6 Clark & Fin. 523; and 3 You. & Coll. 105, 501.

(b) 11 Clark & Fin. 590.

JOSEPH LE FANU, and EDWARD } *Plaintiffs in Error.*  
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JOSEPH MALCOMSON and OTHERS *Defendants in Error.*

THOUGH defamatory matter may appear only to apply to a class of individuals, yet if the descriptions in such matter are capable of being, by *innuendo*, shown to be directly applicable to any one individual of that class, an action may be maintained by such individual in respect of the publication of such matter. *Libel. Pleading.*

In such a case the *innuendo* does not extend the sense of the defamatory matter, but merely points out the particular individual to whom matter, in itself defamatory, does in fact apply.

Therefore, after verdict, a declaration which recited that the plaintiff was owner of a factory in *Ireland*, and charged that the defendant published of him and of the said factory a libel, imputing that “‘in some of the *Irish* factories’ (meaning thereby the plaintiffs’ factory)” cruelties were practised, though there was no allegation otherwise connecting the libel with the plaintiff, was held good.

*A.* and *B.* may join in an action for a libel containing imputations injurious to a trade carried on by them jointly as partners.

THIS was an action of libel. The plaintiffs in the action were Messrs. *Malcomson*, the owners of a factory in the county of *Waterford*; the defendants, Messrs. *Le Fanu*, were the proprietors of “*The Warder*” and “*The Statesman*” newspapers; and the alleged libel was published in the former journal on the 1st of *June*, and in the latter, on the 4th of *June*, 1844.

The declaration contained thirteen counts. The first count set out the libel as published in the *Warder* news-



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paper, and alleged the plaintiffs to be persons of good name, fame, and credit, to wit, at *Portlaw*, in the county of *Waterford*. It then went on in the usual form to allege that "they had never been guilty of tyranny, oppression, extortion, breach of the sabbath day, &c.," and proceeded thus: "And whereas, the plaintiffs, before and at the time of the committing of the grievances by the said defendants as hereinafter mentioned, were, and still are owners of an extensive factory for the manufacturing of cottons, linens, and other fabrics, called the *Mayfield* factory, in which numbers of men, women, and children, are constantly employed, to the great gain and profit of the said plaintiffs, to wit, at *Portlaw*, aforesaid, yet the said defendants, well knowing, &c., but greatly envying, &c., and wickedly and maliciously contriving and intending to injure the said plaintiffs in their said good name, &c.; and to cause it to be suspected and believed by those neighbours and subjects, that they, the said plaintiffs, had been and were guilty of tyranny, oppression, sabbath breaking, and extortion, and wickedly and maliciously contriving and intending to injure, harass, and oppress the said plaintiffs in their said calling, as owners of the said factory for the manufacturing of cottons, linens, and other fabrics, and wholly to ruin the said plaintiffs in their said trade, and calling heretofore, to wit, or, &c., at *Portlaw*, aforesaid, in a certain paper called "*The Warder*," falsely, &c., did compose and publish, &c., of and concerning the said plaintiffs, and of and concerning the said factory, and of and concerning the manufacturing of cottons, linens, and other fabrics, carried on in the said factory by the said plaintiffs, and of and concerning the said trade and calling of the said plaintiffs, a certain false, &c., libel, containing, among other things, the false, &c., matter following, of and concerning the said plaintiffs, and of and concerning the said factory, and of and concerning the manufactory of linens, cottons, and other fabrics, carried on therein by the said plaintiffs; and of

and concerning the said trade and calling of the said plaintiffs, and of concerning their conduct towards, and their treatment of, the persons employed by them in their said factory."

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That count then proceeded to set out the libel as follows:—

"*The Factory Question in Ireland.*—We beg leave to invite the express attention of our readers to the following letter. We had no notion that the abuses of the factory system were so triumphant in this country; we scarcely thought that there were any factories in *Ireland*; but it seems that the abuses in the county of *Waterford* exceed even those committed in *England*. The Factory Bill must have been an United Kingdom bill, that is, a bill extending to the United Kingdom, and therefore of force in *Ireland*. If this be so, working on *Sundays*, or beyond the twelve hours limited, must be illegal, to say nothing of the breach of the common law in the desecration of the *Sabbath*, as the Christian religion is part and parcel of the common law of *Great Britain and Ireland*. The public must feel greatly indebted to our correspondent for his valuable communication. It is a discovery of an outrageous and tyrannical violation of the laws for the protection of the poor labourer; and we hope that the subject will be followed up. Our columns shall be ever open to vindicate the cause of the oppressed. It is scandalous that such slave-driving despotism should be practised with impunity.

"To the Editor of *The Warder*.

"Power, when lodged in their [meaning the plaintiffs'] possession,

"Grows tyranny and rank oppression."—GAY.

"Sir,—I beg you will say, in the next *Warder*, whether there is a law at present in force which prevents the pro-

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prietors of factories from employing their operatives by night and on *Sundays*; and if there is, who is supposed to enforce it. If the same tyranny is carried on in the *English* factories as in some of the *Irish* ones [meaning the factory of the plaintiffs], the *English* members who opposed Lord *Ashley's* motion can, I think, lay very little claim to humanity. Factories being much more numerous in *England* than in *Ireland*, the *English* members had a much better opportunity of knowing the great hardships to which the factory labourers are exposed than the *Irish* members. No person, unless one who is perfectly acquainted with the working of the *Irish* factories, can form any the slightest idea of the cruelties and miseries to which the *Irish* factory hands are subject.

“I know some factories [meaning the factory of the plaintiffs] in this country; and the cruelty with which the operatives in them [meaning the factory of the plaintiffs] are used, is really incredible. The cruelties of the slave-trade or the *Bastile* are not equal to those practised in some of the *Irish* factories [meaning the factory of the plaintiffs, and meaning thereby that the plaintiffs had treated the persons in their employment in said factory with cruelty.]

“In this country, and I suppose in *England* also, the factory proprietors [meaning the plaintiffs] keep their own bread shop, their own grocer's shop, their own shoe shop, their own butcher's shop, &c., and they [meaning the plaintiffs] compel their operatives to buy bread from their baker, groceries from their grocer, shoes from their shoemaker, and meat from their butcher, though they [meaning the operatives in the employment of the plaintiffs] could purchase much superior articles in any other shop at a lower rate, but they [meaning the said operatives] dare not; if they did, they would be turned out of work [thereby meaning that, unless the persons in the employment of the said plaintiffs purchased the before-mentioned

commodities of life from the plaintiffs, at an exorbitant or unfair rate, the said operatives would be deprived by the said plaintiffs of their employment].

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If in one of the factory rooms [meaning in one of the rooms of the factory of the plaintiffs], where there are perhaps two or three hundred persons at work, a pane of glass is broken by accident, every person in the room is fined sixpence, and perhaps some of those wretched beings [meaning the said persons in the employment of the plaintiffs] who are thus fined, do not earn more than one shilling and sixpence or two shillings a-week. Now, admitting the number in one room [meaning a room of the factory of the plaintiffs] not to exceed two hundred, the fine would amount to the enormous sum of five pounds for one pane of glass; and that is a thing frequently done.

“Whenever the proprietors [meaning the said plaintiffs] are in a hurry to get any work done, the hands [meaning the operatives in the employment of the plaintiffs] must work both by night and on Sundays until it is completed; and if one member of a family [meaning of a family in the employment of the plaintiffs] refuse to work on the *Sunday*, the whole family are turned off on the following day. Incredible as this may appear, it is a positive fact.

“I have frequently seen them [meaning the operatives of the plaintiffs] on *Sundays* going in to work at a certain factory in the south of *Ireland* [meaning the factory of the plaintiffs]; and I beg, through the columns of your widely circulating paper, to call the attention of the authorities to it, in order that some measure may be taken to put a stop to such an iniquitous practice [meaning that the plaintiffs were in the habit of violating the due observance of the *Sabbath*, and calling on the authorities of the land to prevent such violation of the *Sabbath* day].

“We may talk of slavery in a foreign country; but if

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the present factory law allows this, and remains unchanged, we have worse, far worse, at home. We have given millions to abolish foreign slavery, and why not do away with slavery at home? [meaning that the labourers in the employment of the said plaintiffs were treated as slaves]. A laudable effort has been made by a few to alleviate the slavery at home, but that humane effort has been defeated by the power of a faction. I hope however before long to see humanity triumph over monopoly; and as your paper has always advocated the cause of the oppressed, I beg you will use the power of *The Warder* to do justice to the poor factory operatives of this country. I am, sir, your obedient and faithful servant, H."

The second count alleged that the defendants, further contriving, &c., heretofore, &c., did publish a certain other false, &c., libel, of and concerning the plaintiffs, and of and concerning the said factory, and of and concerning the manufacturing therein of cotton, &c., by the said plaintiffs, and of and concerning the said trade and calling of the said plaintiffs, containing, amongst other things, in one part of the said libel, the false, &c., matter following, of and concerning the said plaintiffs, and of and concerning the said factory, and of and concerning the manufacturing therein of cottons, &c., and of and concerning the said trade and calling of the said plaintiffs, and of and concerning their treatment of the operatives and persons employed in the said factory by them, that is to say, "No person, unless one who is perfectly acquainted with the workings of the *Irish* factories, can form any the slightest idea of the cruelties and miseries to which the *Irish* factory hands [meaning the operatives employed in the *Irish* factories] are subject. I know some factories [meaning the said factory of the said plaintiffs] in this country, and the cruelty with which the operatives in them [meaning the operatives in the said factory of the plaintiffs] are used is really incredible. The cruelties of the slave trade or the *Bastile* are

not equal to those practices in some of the *Irish* factories [meaning the said factory of the said plaintiffs, and meaning thereby that the plaintiffs treated the operatives in their employment in the said factory with cruelty.]”

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There were the same general allegations in the fourth count, which then set out the libel thus : “If in one of the factory rooms [meaning the rooms of the factory of the said plaintiffs] where there are perhaps two or three hundred persons at work, a pane of glass is broken by accident, every person in the room [meaning every person employed by the plaintiffs in the factory room of the plaintiffs] is fined sixpence, and perhaps some of those wretched beings [meaning the operatives of the said plaintiffs] who are thus fined, do not earn more than one shilling and sixpence or two shillings a week. Now, admitting the number in one room [meaning in one room of the factory of the said plaintiffs] not to exceed two hundred, the fine would amount to the enormous sum of five pounds for one pane of glass, and that is a thing frequently done [meaning thereby that the said plaintiffs were frequently in the habit of obtaining sums of money from the operatives and other persons in their employment in a harsh, cruel, oppressive, and tyrannical manner.”]

The fifth count alleged that the defendants further contriving and intending as aforesaid, to wit, on the day and year aforesaid, at *Portlaw*, aforesaid, in a certain other newspaper, called *The Warder*, falsely, &c., did publish a certain other false, &c., libel, of and concerning the said plaintiffs, and of and concerning the said factory of the said plaintiffs, and of and concerning the manufacturing of cottons, &c., by the said plaintiffs in the said factory, and of and concerning the said trade and calling of the said plaintiffs, containing, amongst other things, and in one other part of the said libel, the false, &c., matter of and concerning the said plaintiffs, and of and concerning the said factory of the said plaintiffs, and of and concerning

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the manufacturing, &c., by the said plaintiffs in their said factory, and of and concerning the trade and calling of the said plaintiffs, and of and concerning the treatment and dealings of [by] the said plaintiffs with [of] the persons employed by them in their said factory, following, that is to say, “whenever the proprietors [meaning the said plaintiffs] are in a hurry to get any work done, the hands [meaning the operatives in the employment of the said plaintiffs] must work both by night and on Sunday, until it is completed; and if one member of a family [meaning of a family employed in said factory by the plaintiffs] should refuse to work on the Sunday, the whole family is turned off [meaning turned out of the employment] on the following day. Incredible as this may appear, it is a positive fact, I have frequently seen them [meaning the persons in the employment of the said plaintiffs] on Sundays going in to work at a certain factory in the south of *Ireland* [meaning the factory of the said plaintiffs] and I beg, through the columns of your widely circulated paper, to call the attention of the authorities to it, in order that some measure may be taken to put a stop to such an iniquitous practice [meaning that the plaintiffs were in the habit of violating the sabbath or Lord’s day, by making their operatives work on Sunday, and that they had thereby incurred certain pains and penalties under the provisions of an act of Parliament made and passed, to ensure the better observance of the sabbath, and that the persons authorized to put the law in force, ought to prosecute and punish the said plaintiffs for such infraction of the said act of parliament.]”

The general conclusion of the declaration was as follows:—

“By means of the committing of which said several grievances by the said defendants as aforesaid, the said plaintiffs have been and are greatly injured in their said good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all their

neighbours, and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects to whom the innocence and integrity of the said plaintiffs in the premises were unknown, have on account of the committing of the said grievances by the said defendants as aforesaid, hitherto suspected and believed, and still do suspect and believe the said plaintiffs to have been and to be persons guilty of tyranny, oppression, and extortion, and have by reason of the committing of the said grievances by the said defendants as aforesaid from thence hitherto wholly refused and still do refuse to have any transaction, acquaintance, or discourse with the said plaintiffs, as they were before used and accustomed to have and otherwise would have had; and the said plaintiffs have been and are by means of the premises otherwise greatly injured, to wit, at *Portlaw* in the county of *Waterford* aforesaid, to the damage of the said plaintiffs of 2000*l.*, whereby," &c.

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To this declaration the defendants pleaded the general issue and two special pleas under the statute 6 & 7 Vict., cap. 96.

The plaintiffs having replied to these pleas, the cause came on for trial at the spring assizes for the county of *Waterford*, in the year 1845, before Baron *Lefroy* and a special jury, when a general verdict with 500*l.* damages was found for the plaintiffs.

Upon this verdict judgment was entered in Easter Term 1845.

Upon this judgment the defendants brought a writ of error to the Court of Exchequer Chamber in *Ireland*, when the judgment of the Court of Exchequer was affirmed. The present writ of error was then brought.

Mr. *T. F. Ellis*, for the plaintiffs in error (the defendants in the Court of Exchequer and plaintiffs in the Court of Exchequer Chamber). In an action for libel by two joint



1848. plaintiffs, it is requisite : 1. That the libel on the record  
 should point to the plaintiffs, and impute an offence.  
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As the damages are assessed generally, if any one count wholly fails to satisfy both these requisites, the declaration is bad : though it is true that a count which contains actionable matter will not be made bad by the occurrence, in the same count, of matter which would not sustain an action. This is the distinction applicable to written libel as well as slander, explained in note (1) to *Hambleton v. Vere* (a), and recently recognized in *Griffiths v. Lewis* (b). Here it will be sufficient to refer to the second, fourth, and fifth counts.

The second count wholly fails to satisfy the first requisite. In *James v. Rutleah* (c), it was laid down that "in actions for slander, two things are requisite : 1st. That the person scandalized be certain ; 2nd. That the scandal be apparent from the words themselves ;" and that "the office of an *innuendo* is to designate a person who has been named before, and in effect, it stands in place of *prædictus* : but it cannot make a person certain who was before uncertain. Nor can it alter or extend the meaning of the words themselves." Now, in the alleged libel set out in the second count, the plaintiffs below are not certainly named : the attempt is to give certainty by *innuendo* to the words "some factories in this country," and "some of the *Irish* factories." It is not shewn that anything preceded pointing the imputation to the particular persons. That this is insufficient, appears from the illustration in *James v. Rutleah* (c). "If one says without any precedent communication, that one of the servants of *J. S.* (he having many) is a notorious felon, or traitor, &c., here, for the uncer-

(a) 2 Wms. Saund. 171 d, (b) 8 Q. B. 841.  
 6th ed. (c) 4 Rep. 17 a.

tainty of the person, no action lies ; and an innuendo cannot make it certain. So if one says generally, ' I know one near about J. S. that is a notorious thief,' or such like." Similar instances are given in *Bolle's Abridgment* (d). Thus, pl. 12 : "*Lou les parols en eux mesme sont incerten, issint que ne poet estre intend, que ils fueront parle d'ascun person certain, la ils ne poient estre fait actionable per ascun averrment, Mich. 3 Jac., B. R.—per Tanseild. Come si home dit, one of my brothers is, &c. Nul action gist per ascun averrment, Mich. 3 Jac., B. R. per Tanseild.*" So pl. 13. "*En un action enter A. et B. si 3 homes severalement devant les justices d'Assises done evidence al un Jury vers A. et sur ceo A. dit al eux, There is one of you that is perjured in the giving of this evidence. Sans nomer ascun de eux, nul de eux poet aver action per averrment, que les parols fueront parle de luy.*" Placitum 14 is stronger still, and goes much beyond any doctrine necessary for the present plaintiffs in error. "*Si home dit, My enemy, &c. Chargeant luy ove scandalous matters, que voilent maintayner action, uncore nul action gist per ascun, per un averrment que les parols fueront parle de luy, et per un innuendo, &c. Pur ceo que les parols en eux mesme sont tout ousterment uncertaine, Trin. 39 Eliz. B. R. Enter Jones and Daukes adjudge. Issint en cest case l'action ne giseroit per averrment auxi que al temps del parlance del parols il mesme fuit l'enemie del defendant, et que le defendant adonque navoit ascun auter enemie forsque le plaintiffe, car ceo est uncertain, nec poet estre conus si il avoit auter enemie preter le plaintiffe.*" A *quære* is added to this last ; and it might perhaps be fairly contended that the averment was enough on demurrer, as here it might have been sufficient to allege that the factory of the plaintiffs below was the only *Irish* factory known to the defendants below. In *Brown v.*

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(d) 1 Ro. Ab. 81, *Action sur Case* (H).

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*Low* (e), where it was held that "Thy master *Brown*" is sufficiently certain, "for it shall not be intended that he had more masters of that name," it nevertheless was agreed by the Court, if one saith to *J. S.*, "Thy son hath robbed me;" and his son bring an action, he cannot, without averring that he had no more sons, maintain it: "but if one saith to a son, thy father, or to a wife, thy husband hath robbed me, the action lies for the father or husband, without any such averment; for there cannot be more fathers or husbands." In *Pierson v. Dawson* (f), however, a declaration was held good, after verdict, where it was charged that the defendant said to "*Mary*, the mother of the plaintiff," "your son is a thief; *innuendo* the plaintiff, then the son of the said *Mary*:" and the reason is important: "for the Court shall not intend that *Mary* had any other sons besides the plaintiff." And there a case is mentioned by the Court: "where one said your landlord (without a surname) is a thief; in such an *innuendo* it was, after great debate (the court being at first divided in opinion) adjudged naught. But there, if the plaintiff had averred that he to whom the words were spoken had no other landlord, it had been good." Now it is clear that the least strong of these cases is much stronger than is necessary for the present plaintiffs in error. Not only can it not be intended that there are no other factories than the one factory of the defendants in error, but the contrary appears by the very words, which are "some factories in this country," and "some of the *Irish* factories." [Lord *Campbell*.—Do you say that those cases are law now? Is there any subject respecting which the early authorities exhibit greater absurdity than respecting libel and slander?] 'The absurdity has consisted in straining the meaning of words so as to give them a sense which shall convey no imputation. Words are now to be taken in their na-

(e) Cro. Jac. 443.

(f) Aleyn, 32.

tural sense ; but the principle of the cases cited is sound : because it is necessary, in order to show a cause of action, that the plaintiff should not only in fact have been the person of whom the defendant was thinking, but that the defendant should have used words pointing out the person. The offence is not in the opinion formed by the defendant, but in his communication of that opinion to others, so that they must understand and may adopt it. And therefore, in this respect, the old cases have not been overruled. [Lord *Campbell*. But has the principle been recognized in modern times ?] Very recently, in a judgment pronounced in the Court of Queen's Bench, after time taken for consideration, *Solomon v. Lawson* (g). There the first count of the declaration stated, in effect, that the plaintiff was a merchant at *St. Helena*, employed in supplying with fresh water, ships which called there, by his ship which was fitted up with wooden tanks, that by this ship he had supplied *The Moffatt* with good fresh water conveyed in the wooden tanks : yet defendant, contriving to injure him in his employment, and to cause it to be believed that he had supplied *The Moffatt* with unwholesome water, in copper tanks, published, of and concerning him and his employment, and his conduct in supplying the water to *The Moffatt*, a libel, which was set out. The alleged libel, as set out, stated that the passengers in *The Moffatt* had been taken ill shortly after leaving *St. Helena*, where they took on board fresh water ; and added : "there is no doubt that their illness was caused by the water ; and it appears the water is run into a copper tank at *St. Helena*, from whence the casks are filled alongside. There is no doubt, therefore, that the poison is imbibed from this copper tank ; and it behoves the authorities immediately to order its removal, and replace it with an iron one." The *innuendo* was, "thereby then and there, meaning and intending that the plaintiff had been guilty of selling, con-

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veying, and supplying bad and unwholesome water to the said ship *The Moffatt*." After verdict for the plaintiff, a rule was obtained to arrest the judgment. It was pressed upon the Court, in support of the rule, that "a statement is made affecting no particular person; and then the plaintiff comes forward and insists that it shall be understood that he was charged by it:" and, as it clearly appears from the judgment, the rule was, on this objection, made absolute. The Court, after intimating a strong opinion that it did not appear that the imputation was that any one had conveyed the water by tank from on board any vessel, gave judgment on the following ground: "Suppose however (which is perhaps assuming a good deal) that the tank may mean a tank on board a vessel fitted up to supply others with water, and that 'the authorities' are called upon to put down a nuisance belonging to some individual. Still the question recurs, *what* individual? None is pointed at; there is nothing to shew that the plaintiff *alone* had a schooner with a tank to supply ships at *St. Helena*; it is uncertain, therefore, what number of persons there may be at *St. Helena* similarly situated, to all of whom the observation would equally apply, and to some particularly. We think, therefore, that there is nothing in the letter which warrants the *innuendo* applying the imputation of misconduct to the plaintiff; and that this count cannot be sustained." Now the hypothesis upon which judgment is there pronounced differs from the actual record here only in this: that, whereas there it was uncertain whether there were not other persons in the same predicament with the plaintiff, it here appears with certainty that there were. *A fortiori*, therefore, there can be no judgment here for the plaintiffs below.

The fourth count also fails to satisfy the first requisite. The libel there set out imputes only that, "if, in one of the factory rooms, a pane of glass is broken by accident, every person in the room is fined sixpence." But it is not

said by whom the fine is imposed, nor that the plaintiffs below are in any way privy to it. It is not uncommon for work people in some employments to impose fines on each other, by rules among themselves, for the purpose of forming a joint fund, with which the employers have nothing to do. At all events, the fining should be brought home to the plaintiffs below. Nor is it shewn what is meant by "operatives," in the *innuendo*. These defects are not remedied by the general *innuendo* at the end of the count, which, coming where it does, cannot be applied to explain and give certainty to the separate unexplained words, one after another, of the supposed libel; and which, indeed, is applicable only to the words "that is a thing frequently done." Nor if it was distinctly applicable to the word "fined," is it precise enough to give to the word "fined" the meaning of "fined by the plaintiff." Nor could any *innuendo* give such a meaning to so uncertain an imputation: that is not the office of an *innuendo*, which, according to the principle already cited from *James v. Rutleah* (a), cannot "extend the meaning of words." Suppose the words were, "Young females in factories are often seduced," could that be converted into a libel on *J. S.* by an *innuendo*, "meaning thereby that *J. S.* was in the habit of seducing young females in factories?" Nor is this helped by the verdict. The rule as to this is explained by Lord *Abinger* in *Hughes v. Rees* (b). "If, according to their *natural import*, the words are libellous—although they might be explained away—the verdict of the jury is conclusive, but not otherwise. Where they are ambiguous in themselves, the verdict of the jury will not help them."

The fourth count (and a similar objection applies to the fifth) fails to satisfy the second requisite. The injury shown should be an injury affecting the joint interest of the plaintiffs: it is not enough that it should be shown to be an injury affecting each separately. Two partners

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(a) 4 Rep. 17 a.

(b) 4 M. & W. 204, 207.

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may each suffer from the same act, and even owing to the same circumstance, as the ownership of a particular factory, and yet there may be no joint injury: that must be something shown to affect the trade. Now how does it appear that the imputation of fining for broken glass, or forcing the workmen to work on *Sundays*, affects the interests of the joint trade? There is no allegation that it does so, nor any of special damage. It is no answer at all, that circumstances might be guessed at which would make such an imputation affect the trade. In *Ayre v. Craven* (a) the inducement stated that the plaintiff carried on the profession of a physician, and that the defendant, in a discourse concerning him, so carrying on the said profession, contriving and intending to have it believed that the plaintiff had been guilty of a criminal connexion with a married woman, spoke of and concerning the plaintiff so carrying on such profession, and of and concerning him in his profession, words importing that he had been guilty of a criminal connexion with a married woman. The action being for words which imputed no offence punishable by criminal law, it was necessary to show that the words were spoken of the plaintiff so as to affect him in his profession, as here it is necessary, in order to show a joint injury, to show that the alleged libel affects the trade of the plaintiffs below. Judgment was there arrested: and the reason given is applicable here. The declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession." It was urged, in the present case, in the argument below, that evidence might have been given to satisfy the jury that persons had refused, or were likely to refuse, to enter the employment, on account of these imputations. That was the suggestion which is met expressly in the

(a) 2 A. & E. 2.

judgment in *Ayre v. Craven* (a). The Court thus puts the argument against the rule: "being laid as spoken of the plaintiff as a physician, in which character he may have opportunities of abusing the confidence reposed in him, to commit acts of criminal conversation, the statement must be thought large enough to admit such proof to be adduced on the trial, in which case the necessary proof would be presumed to have been given, and the judgment ought not to be arrested." But to this suggestion the court gives the answer already cited. So, in *Brayne v. Cooper* (b), the declaration stated that the plaintiff carried on the trade of a stay-maker, and the defendant, contriving and intending to injure him in his said trade, spoke of him, in his said trade, the words following: "the business of a stay-maker does not keep him, but the prostitution of the person in the shop; after it is shut, it is as bad as any bawdy-house in the town." *Littledale, J.*, directed the jurors to find for the defendant, unless they thought the imputation was that the plaintiff kept a bawdy-house; and, the jury having found for the defendant, the Court of Exchequer held the direction right. There it might be said, as here, that the words might well injure the plaintiff in his trade. But the judges said that they could not consider the words as used in any other sense than as a general imputation on his moral conduct.

Some cases on the subject of joint actions for defamation are collected in *Robinson v. Marchant* (c): the point was not, however, there decided: but it seems to have been understood that, to give a joint cause of action to the two parties there, the imputation should be that of insolvency in their joint trade: and that was the case in *Forster v. Lawson* (d). Several cases on the same point are also collected in *Pechell v. Watson* (e). In *Barratt v.*

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(a) 2 A. & E. 8.

(b) 5 M. & W. 249.

(c) 7 Q. B. 918.

(d) 3 Bing. 452.

(e) 8 M. & W. 691, 697.



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*Collins* (a) two persons brought a joint action for a malicious arrest in an action by the defendant against the two jointly: and it was held that they could recover only for the joint expences incurred in the first action in procuring their liberation, and not for their personal suffering. In *Cook v. Batchellor* (b) two partners recovered in a joint action for words imputing that they gave false weight. *Smith v. Cooker* (c), which is sometimes cited on this point, is inapplicable: it does not appear that the action there was joint; and the question was as to the meaning of the words, which imputed that plaintiff and his wife had bewitched a mare; the argument being that the words meant nothing, because two could not commit one witchcraft; but the court held that the words might mean that the two had severally bewitched the mare. For that, of course, either might have maintained the action: but no joint action could have lain. Reference was there made to *Dyer* (d), where it was laid down that two could not sue a man jointly for his calling them "two false knaves." In *Coryton v. Lithebye* (e) the declaration showed that there were certain mills, at one or the other of which the corn of the tenants of a manor had been immemorially ground: and it was held that the owners of the mills might join in an action against a tenant for grinding elsewhere; the court saying that, though the interests of the plaintiffs in the mills were several, the not grinding at any of the mills was a joint damage. There the defendant could not injure the one without injuring the other. These cases show the general principle upon which a joint action for injury may be maintained. Here the declaration not connecting the imputation with the interest in the trade, the injury is in imputing unkind conduct. But the unkindness of A. is not the unkindness of B.

(a) 10 B. Moore, 446.

(b) 3 Bos. & Pul. 150.

(c) Cro. Car. 512.

(d) 1 Dyer, 19 a, pl. 112.

(e) 2 Saund. 115.

Suppose the imputation had been that 'the proprietors debauched young females employed in the factory: could all the proprietors have brought a joint action, without allegation of special damage, or averments connecting the mischief arising from the imputation with the joint trade?

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The defendants in error must contend that, to impute that in some out of several *Irish* factories workmen are extortionably fined by some persons, is an injury for which the partners of any single factory can maintain a joint action.

Sir *F. Kelly* and Mr. *Cowling* (Mr. *Harris*, of the *Irish* Bar, was with them) for the defendants in error.

It may be admitted that the matter complained of must be defamatory of some known person, and that if not so in itself, it cannot be made so by an introductory averment. But on the other hand, it is not because a libel may, by possibility, be made applicable to other persons, that the libeller cannot be made answerable to the person to whom its application is clear and undoubted. If it can be shewn that the libel does apply to the plaintiffs, that is sufficient. Even *Solomon v. Lawson*, is an authority for that position. Can it be shewn here that the plaintiffs in the court below were persons to whom this libel would apply? If it can, the action is maintainable; for it is not necessary to exclude the possibility of the application to other factories. What is said in *Brown v. Low* (a) is mere *obiter*.

First, there is the allegation that these seven persons were trading together as a firm; that as such they were proprietors of a factory; that they carried on business there, and there employed a great number of men, women, and children to their own great profit; and then comes the allegation that the defendant, intending to injure them in their said business as owners of the said factory, published the matter following. Every count must be taken to import into it the whole of the introductory allegations.

(a) Cro. Jac. 443.

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If so, then the second count avers that the libellous matter was spoken of and concerning the plaintiffs, and of and concerning the factory, trade, and calling of the plaintiffs, and of and concerning their treatment of the operatives therein. These averments fully connect the libel with the parties libelled. Can it be said that the matter thus set forth cannot be made the subject of an action for libel? The charge that in "some factories" bad practices exist, is undoubtedly a libel on somebody. Is not a party to whom this general statement has been supposed to apply, to shew such application? In one of the old cases the rule is stated that the words complained of are to be construed in *mitiori sensu*. But that is not the rule now. The law now requires that such matter shall be read and construed as mankind in general would read and construe it. According to *Woolnoth v. Meadows* (a), the words complained of are to be construed not according to any fancied legal signification, but according to their ordinary import.

The case of *Solomon v. Lawson* (b) does not apply to the present; for there the court held the matter complained of not to be itself libellous on the plaintiff, and consequently it could not be made libellous on him by any introductory averments. But that case does not establish that where, as here, the matter is libellous on somebody, though not in terms libellous upon the plaintiffs, it may not be shewn to apply to them in particular. In that case the court was clearly of opinion that there was not any intention to libel the individual, that the imputations contained in the article were cast, not upon an individual, but upon the authorities of the Island, and consequently that he could not complain of it. That case is not in any way analogous to the present. The true rule is, that whether parties are named or not, if the libel has an individual application, and if the witnesses shew it to have such application, that is suffi-

(a) 5 East, 463.

(b) 8 Q. B. 823.

cient. It cannot now be contended that if a libel alleged that in a certain factory a certain immoral practice existed, no action could be maintained without shewing that there was no other factory. The *dictum* in *Brown v. Low* (a), which is merely *obiter*, is not law.

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No case can be cited to establish that where, as here the matter, though not in terms libellous upon the plaintiff, is libellous in itself, it may not be shewn, by proper *innuendo*, to apply to a particular person. If that could not be done, the most malicious and injurious libels might always be successfully disguised. The cases bearing on this subject are collected in the notes to *Craft v. Boite* (b), and they shew that when words are in themselves defamatory, they may be applied by an *innuendo* to a particular individual.

Then as to the same objection as applicable to the fourth count. The words there set forth impute great cruelty and oppression to the owners of some factory. It is true that the plaintiffs are not named, but the publication appears in a particular part of the country where every one is capable of understanding its allusions. The reader, therefore, applies what is said of some factories to some particular factory. The owner of the factory thus made the subject of imputation, must surely be entitled to show that his factory has been unjustly held up to public reprobation. He can only do this by introductory averments and *innuendos*, and whether he has done so truly or not, then becomes a question of fact for the jury.

The count now objected to imputes in substance to the proprietors of factories, and therefore to the plaintiffs as the proprietors of a factory, cruel and oppressive conduct towards the workmen in their employment, such as that of compelling them to work on Sundays, and at nights. That must have a tendency to injure the plaintiffs in the way of their trade. The jury found that it had that tendency. In such a case it cannot be held by the court that where

(a) Cro. Jac. 443.

(b) 1 Wm. Saund. 244.

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the matter charged is itself libellous, and where it is charged against persons carrying on the trade of the plaintiffs, and is averred to be applied to them, and is found to be, in fact, so applied, that such an action as the present is not maintainable.

It is then said, that unless the counts complain of matter which not only imputes misconduct to the plaintiffs, but has also a tendency to injure them in the way of their trade, the two matters cannot be joined in one count. Assuming the objection to be valid in itself, it is clear that it cannot affect the judgment in this particular case. If a count contains the statement of one cause of action which may be joined with another, and also of another cause of action which may not be joined with the first, it must be presumed, after verdict, that the judge directed the jurors to confine their attention to that part of the count which was good. It must be presumed here, that the judge directed the jury, that no damages could be given for the injury to the moral character of the plaintiffs alone, but that there might be damages, if, on each count, it appeared that language had been used which would have had a tendency to injure the plaintiffs in the way of their trade. That presumption would confine the damages to the trade injury entirely, and for that injury a joint action is maintainable.

As to the objection that no joint injury is alleged to have been suffered, and that therefore the plaintiffs cannot join in the action; it cannot be denied that if each count contains any cause of action for which two parties may sue jointly, they may also sue separately. *Robinson v. Marchant*(a), shews that. There the declaration alleged a partnership between the plaintiff and other persons as bankers, and that divers persons banked with the plaintiff and his said partners; and it averred that the defendant, intending to injure the plaintiff in his credit, and in his said trade and

(a) 7 Q. B. 918.

business, uttered the words complained of. The defendant pleaded in abatement that the plaintiff carried on the said trade and business jointly with his said partners, and not otherwise; and that all the damage, &c., accrued to him jointly with them; but the plea was held bad, because it was pleaded in terms to damage, and the damage to the partnership was not so essentially the cause of action, that without it the action could not be maintained. The result of the libel must be looked to; and if the natural result would be, as it would be here, a joint injury to the plaintiffs, as by damage to the trade they jointly carry on, then the remedy for that joint injury is properly a joint action for damages.

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Though two persons may not join in an action for one utterance of words relating to each individual, they may, if they are partners, join in action for such words as occasion them to sustain special damage in the way of their joint trade. *Coryton v. Lythebye* (a). That, too, is the rule in slander. In libel the action is maintainable without special damage. *Craft v. Boite* (b), *Bell v. Stone* (c), *Thorley v. Lord Kerry* (d); in *Clement v. Chivis* (e), this distinction is fully explained. The cases of *Ayre v. Craven* (f), and *Brayne v. Cooper* (g), are not in point on this subject, for they were actions of slander, and were therefore not maintainable in respect of words, not actionable in themselves, and not shewn to have been attended with special damage. The distinction between slander and libel is made, as it is said, on account of the greater danger of written matter. Whether that reason is sound, or the reverse, need not now be considered; the distinction itself is well established.

The cases of *Ayre v. Craven*, and *Brayne v. Cooper*, were cases of slander. In neither of them was special damage

(a) 2 Wm. Saund, 116 b.

(d) 4 Taunt. 355.

(b) 1 Wm. Saund. 248.

(e) 9 Barn. & Cr. 172.

note.

(f) 2 Ad. & El. 82.

(c) 1 Bos. & P. 231.

(g) 15 Mee. & W. 249.

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alleged, nor was there anything in either of them to shew that the words complained of were directed to the trade of the parties. Here the matter was written libel. There is no doubt that it was libellous in itself: it was averred to apply to the plaintiffs; and was so found by the jury. After verdict, especially upon a plea of Not Guilty only (the effect of which is so much narrowed by the new rules), it must be assumed that those averments were properly supported by evidence; and objections to an *innuendo* that might be available in another way, cease to have any force after verdict.

Mr. *T. F. Ellis*, in reply.—The plaintiffs in error do not contend that it is necessary that the party libelled should be named, but only that no action lies where the imputation is merely that one of a class has committed the act. [Lord *Campbell*.—Suppose the libel was, “we know a lady” who has done so and so.] That is not referring to a class, but to an individual; but probably that would not be actionable unless it appeared on the record that something which preceded or followed connected the plaintiff with the charge. [Lord *Campbell*.—Suppose it was “a *Welshman*,” or “a lady living in *Portman-square*.”] That would not be actionable, according to the authorities; and, on the other hand, it may be asked, suppose the words were “a *European*,” or “a lady living within the four seas.” [Lord *Campbell*.—What modern authority is there to shew that those words would not be libellous if there were proper *innuendos*? In *Solomon v. Lawson* (*a*), there seems, in the opinion of the court, to have been no imputation at all.] The judgment is there given on the assumption that there was an imputation. The court indeed intimates (and it is not necessary now to question the correctness of that view of the case) that there was no imputation: but that is not the ground of the judgment, which expressly proceeds on the assumption that there was an imputation on some ship-owner who supplied

(a) 8 Q. B. 823.

ships with water from tanks. If there was another good ground, as suggested on the other side, upon which the judgment might have been supported, that only strengthens the inference as to the degree of confidence felt by the court on the point upon which it preferred to give judgment, and which is the point for which the plaintiff in error now contends.

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[*Lord Campbell*.—I should like to ask whether you have any modern instance where the principle for which you contend has been applied, the imputation being that of a crime?]

It surely can make no difference, as to the application to a particular person, what the imputation is. But, in fact, in *Solomon v. Lawson* (a) the court says: "Suppose the words to be 'a murder was committed in A.'s house last night:' no introduction can warrant the *innuendo* 'meaning that B. committed the said murder;' nor would it be helped by the finding of the jury for the plaintiff. For the court must see that the words do not and cannot mean it, and would arrest the judgment accordingly." That is precisely in point, unless there is a difference between the words "a murder was committed" and the words "somebody committed a murder." And the observation is so far from being a mere *dictum* that it is put forward by the court as an exposition of the general principle upon which the judgment is to be founded. In *Wiseman v. Wiseman* (b), "*Tunfield* made a difference, when the words themselves import in themselves apparent uncertainty, and when they may be ascertained by intention. In the first case no averment will aid it; but in the last case by the averment and verdict it may be aided; and therefore if the words had been, *one of my brothers is perjured*, there be in them an apparent uncertainty. And although one of the brothers would bring the action, and aver they were spoken of him, because it appears to the

(a) 8 Q. B. 823.

(b) Cro. Jac. 107.



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court there were divers brethren" (as here divers factories), "and it doth not appear to any, of whom he spake, the action lies not, although he be found guilty by verdict." It does not, however, appear that, on behalf of the defendants in error, it is attempted to distinguish the authorities cited; it is only urged that the law is changed. But no authority has been adduced to show any such change; nothing of the sort follows from the overruling of the decisions where it was held that the imputations themselves were to be construed *in mitiori sensu*. It is said that a libel might, on the principle contended for, be always disguised: but the cases show how that is to be met by apt allegations: and, if there are no means of supporting such allegations, there is nothing to complain of. As to the introductory averments, they are not stronger here than in *Solomon v. Lawson* (a).

The only answer suggested to the objection as to the joinder is that the imputation might, in some way or other, capable of proof, injure the trade. But this is directly met by *Ayre v. Craven* (b), in which exactly the same argument is suggested and answered. It is said that the rules as to spoken slander are more strict than those as to written libel. But the strictness relates, not to the interpretation of the expressions used, but to the nature of the offence imputed. The imputations are interpreted on the same principles in the two cases: only some imputations, if merely orally made, are not actionable, which would be actionable if written.

The argument as to the effect of the verdict is met by the authorities cited, which relate all to objections taken after verdict.

It is suggested that the effect of the plea of Not Guilty is now narrowed by the new rules. But there can be no doubt that the applicability to the plaintiff, and the effect

(a) 8 Q. B. 823.

(b) 2 A. & E. 2.

of the imputation, are still both brought into question by Not Guilty.

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The *Lord Chancellor*.—My Lords, I have paid great attention to the arguments raised in objection to the judgment pronounced below, and I see no reason to reverse that judgment.

The first proposition contended for is, that this is a complaint of the publication of a libel which, although found by the jury as intended to apply to the plaintiffs, is so framed that no *innuendos*, even after verdict, can support the declaration in which that complaint is made. Now the question is not whether the matter complained of is libellous, for about that no question can be raised. If it had been addressed to the plaintiffs by name, and it had been said that the plaintiffs had done so and so in their factory, no question could have been suggested but that that would have been libellous. But the way in which the plaintiffs are referred to is expressed by the term “some factories.” “If the same tyranny is carried on in the *English* factories as in some of the *Irish* ones,” and a little further it goes on—“No person unless one who is perfectly acquainted with the working of the *Irish* factories can form any, the slightest, idea of the cruelties and miseries to which the *Irish* factory hands are subject. I know some factories in this country; and the cruelty with which the operatives in them are used is really incredible. The cruelties of the slave trade or the *Bastille* are not equal to those practised in some of the *Irish* factories.” The declaration, after introducing those words has the *innuendo*—“meaning the factory of the plaintiff;” and the jurors have, by finding a verdict for the plaintiffs, found that the words were used in allusion to the factory of the plaintiffs.

In that state the question arose below, and arises here, whether the judgment founded upon that verdict can be

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maintained on such a declaration ; that is to say, where terms are used which must have reference to some one (for the terms "some of the *Irish* factories" must evidently mean to apply to some *Irish* factories) ; and the *innuendo* is that the words do apply to the plaintiffs' factory ; and the jurors have found that that *innuendo* is true, and that the plaintiffs, who are the proprietors and owners of a factory in *Ireland*, were the persons meant. If a party can publish a libel so framed as to describe individuals, though not naming them, and not specifically describing them by any express form of words, but still so describing them that it is known who they are, as the jurors have found it to be here, and if those who must be acquainted with the circumstances connected with the party described may also come to the same conclusion, and may have no doubt that the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libelled were not permitted to have that protection which the law affords. If they are so described that they are known to all their neighbours as being the parties alluded to ; and if they are able to prove to the satisfaction of a jury that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in a state which would prevent the party being protected against such libels.

Some old cases were referred to, in which some singular opinions appear to have been expressed, and some singular doctrines laid down ; but I was anxious to find whether the counsel was able to refer to any modern case, in which after the jurors had found, as in this case, the court had held that a party so circumstanced as the plaintiffs were here, were not entitled to the benefit of a verdict so obtained. I have found none but the case of *Soloman v.*

*Lawson (a)*, referred to, and that is supposed to be a case containing the law as it now exists on this subject. Particular expressions of the Lord Chief Justice, who delivered judgment in that case, have been relied on, but it is more important to look at the whole case, and see what it is to which that judgment was intended to apply. All expressions must be construed with reference to the matter then under consideration, and it is clear that the decision in that case turned on this point, whether the matter was in fact libellous on a particular individual. Whether a right conclusion from the facts of the case was or was not drawn by the court in that instance, is immaterial, but the judgment proceeded on that point. The language used by Lord *Denman* is: "The question therefore, is whether the alleged libel has any reference to the tank being used; and looking at the libel, I should say it certainly had not: it described injury arising from water having been supplied to shipping which had been kept in copper cisterns, and then it says "it required the authorities to look after it." So far, my Lords, from referring to any individual as having been the author of that mischief, it says "it behoves the authorities at *St. Helena*," (that being the place where the injury was supposed to have been committed) "to look into it." Therefore, looking merely at the terms used, so far from being an imputation on any individual, it would appear to apply to some arrangement made by the authorities at *St. Helena*, who had improperly permitted water to be kept in a copper tank instead of being kept in an iron reservoir. In the judgment of the Court the alleged libel was not a libel on the individual complaining of it, but, if a libel at all, was a libel on the authorities. That is the ground on which Lord *Denman* put his judgment, and he says, "This does not impute a libel to any body, no individual

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can come forward and say, I am the person intended to be referred to by the libel so used." That being the only case in support of the argument, that the individual libelled must be expressly named, or unmistakably referred to, and there being, I believe, a very general practice to the contrary, and common sense being entirely to the contrary, I cannot think the proposition is at all established, that under the circumstances of this case the *innuendo* found to be proved by the jury is not sufficient to entitle the party to the remedy he asks.

But then, my Lords, other objections are made, applicable to particular counts in the declaration. The complaint is made by the plaintiffs in their character of owners and conductors of a factory, and in some of the counts, it is now said, have made the complaint as if there was an injury to themselves individually, and not to them in their character as joint proprietors of the factory. It is very properly admitted that, if the count contains a complaint of that which affects them in their joint character as proprietors, though it may also make a complaint of certain matters which may affect them individually, inasmuch as the complaint of that which affects them in their joint character may be sufficient to support the action, the additional fact that the count also makes another complaint which cannot be maintained, is not sufficient to vitiate the judgment that has been pronounced. Therefore, in looking through these counts, we must see whether there is anything which contains matter applying to the plaintiffs individually, and not to their joint character.

I have looked through these counts, and it appears to me, that although there may be expressions which, taken by themselves, refer to the individual character of some of the plaintiffs, they contain matter which shews that the complaint is addressed to their character of joint proprietors of the factory.

The fifth count states that the defendants "did compose

and publish, &c., a certain other false, wicked, scandalous, and defamatory libel, of and concerning the said plaintiffs, and of and concerning the said factory of the said plaintiffs, and of and concerning the manufacturing of cottons, linens, and other fabrics by the said plaintiffs in the said factory, and of and concerning the said trade and calling of the said plaintiffs."

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Can it be contended that this is a complaint made of injury sustained by the plaintiffs in their individual character? Is it not in terms descriptive of the injury alleged to be sustained by them in their character of proprietors and managers of the factory in question? It seems to me to be clear that it is so, and that although there may be expressions which ought not to be there, if the complaint was intended to be made of injury sustained by them in their character of joint proprietors, it is quite sufficient on every one of these counts to shew that the complaint was intended to apply to the property which belonged to them jointly, in respect of which, therefore, they are entitled to support an action by themselves as proprietors.

On these grounds, on the two points which were relied on as objections to the judgment of the court below, I am of opinion that the judgment of the court below should be affirmed.

Lord *Campbell*.—My Lords, I am likewise of opinion that the judgment of the court below ought to be affirmed.

The first objection which has been relied on by the counsel for the plaintiff in error, who certainly has argued the case with his usual ability, and has brought forward all the arguments that learning and talent could supply; the first objection is that this libel applies to a class of persons, and that therefore an individual cannot apply it to himself.

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Now, I am of opinion that that is contrary to all reason, and is not supported by any authority. It may well happen that the singular number is used; and where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, and the jurors are to determine whether, when a class is referred to, the individual who complains that the slander applied to him is, in point of fact, justified in making such complaint. That is clearly a reasonable principle, because whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and christian name were ten times repeated.

Then where is the authority for the argument which has been urged by the plaintiff in error? Mr. *Ellis* relies on *Solomon v. Lawson*, but the proposition there laid down, and which I adopt, is this, that where there is a publication or a sentence spoken verbally, which clearly conveys an imputation of crime on some person, that in that case it may 'by *innuendo* be applied to the plaintiffs; if that proposition is well supported in law, the objection made here fails, because, in this case, there clearly is a gross imputation on some individuals, and the question is whether it may not be applied to the plaintiffs. What is there to shew that that proposition is not well founded according to authority? There is *Solomon v. Lawson*, but there it was an historical fact that was narrated; all that was there stated might be true, without imputing blame to any person. There was no charge brought against either a class or an individual, and by mere *innuendo* you cannot give a new sense to words which they do not naturally bear. It comes round to the old rule, that you

cannot by an *innuendo* extend the natural meaning of the words which are spoken or written, but by the *innuendo* you may point out the particular individual to whom these words apply: those words, in themselves, clearly imputing a crime on the part of some one individual. That being so, I think, according to principle and authority, this objection ought to be overruled.

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The other objection which is relied upon is that this is an action brought by several persons, seven I think, and that no joint injury is pointed out on the record; but a joint injury is pointed out on the record, if the libel is speaking of them in a trade which they jointly carry on. The declaration here alleges that the plaintiffs are partners in carrying on this factory in *Ireland*, and it alleges that the libel is speaking of them in their trade; and there are *innuendos* applying the different parts of the libel to the plaintiffs in their trade. Assuredly that is not enough, unless the language employed will naturally bear the interpretation put on it, and can be shown to refer to them. Then does it so refer to them? I think it does. I do not know whether the second, third, fourth, fifth, or sixth count is considered most objectionable. I suppose the second is as objectionable as any, and therefore I point your Lordships' attention to that count. The libel is there set forth in these terms. (His Lordship first read the libel, and then the libel with the *innuendos*.)

And then there is another count, the fourth count, in which the libel imputes to the owners of these factories that they are guilty of gross oppression; and the fifth count is respecting the working in the factory. All these impute misconduct to the plaintiffs in carrying on their factory, and they all relate to the trade of the plaintiffs. Now suppose that several persons were in partnership as grocers, and it was alleged that they sold by short measure or false weight, or that they adulterated their goods; they might bring a joint action for that; that would be an alle-



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gation as to the manner in which the business was carried on, and I apprehend wherever there is slander, whether written or spoken, imputing to partners that they fraudulently and contrary to law employ a particular mode to carry on business, that is a libel in which they must be jointly included as partners in their trade. I know of no case which at all impugns that proposition, and therefore I am of opinion that this is a case in which the plaintiffs below, being slandered as regards the manner in which they carry on their trade, sustain a joint injury, for which they may maintain a joint action.

Judgment affirmed, with costs.

WILLIAM POTTS, the younger - - Appellant.

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June 29.

JOHN NARNEY POTTS, WILLIAM POTTS, }  
the elder, and OLIVIA HANDCOCK - } Respondents.

A TESTATOR, after devising real estates to trustees, to the use of *Will. Chattels real and personal. Vesting.*  
*J. D. P.* for life, remainder to his first and other sons in tail male, with like remainders to *J. T. P.* for life, and to his sons in tail male, and to several others, bequeathed real and personal chattels to the same trustees, to permit the said *J. D. P.* to receive the profits for his life; and from his decease to permit each of the several other persons, to whom an estate for life in the real estates was before limited, as each of them should become seised of said real estates under the aforesaid limitations, to receive the rents and profits thereof for his and their life and lives respectively; and from and after the decease of the last of the said tenants for life as should become seised in manner aforesaid, or if none of them should so become seised, then from the decease of the said *J. D. P.*, upon trust to assign and convey the chattels to such person or persons as should then become seised of the said real estates under any of the limitations aforesaid:"

Held, that the chattels vested in an infant, grandson of *J. D. P.*, who was tenant in tail of the real estates at *J. D. P.*'s death, and not in his eldest son, a prior tenant in tail, who died in *J. D. P.*'s life time.

THIS was an appeal from a decree of Sir *Edward Sugden*, Lord Chancellor of *Ireland*, upon the construction of a clause in the will of *John Potts (a)*.

*John Potts* being seised under the will of his bro-

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ther *James*, of fee simple and other freehold estates, and possessed of leaseholds for years, and other personal estates, including two-thirds of an establishment for printing and publishing a newspaper, called "*Saunders' News-Letter*," in *Dublin*; and having also freehold and personal estates of his own acquiring, made his will in the year 1799, which he republished in 1810: and he thereby devised to the Rev. *Abraham Downes* and *Thomas Handcock*, and the survivor of them and his heirs, all the real and freehold estates, of which he was seized under his said brother's will, to the use of *James David Potts*, second son of his brother *William*, for his life, remainder to the said trustees to preserve contingent remainders; and after the decease of the said *J. D. Potts*, to the use of his first and other sons successively in tail male, with like remainders and apt words of limitation to the use of *John Tromperant Potts*, eldest son of the testator's said brother *William*, and his first and other sons; and also to the use of *William Potts*, the said *William's* third son, and his first and other sons; with other remainders over (*b*).

Then followed a devise of the freehold estates of the testator's own acquiring, with like limitations to his said three nephews, but in this order, *William* first, *John Tromperant*, and *James David*, and to their first and other sons in the same order, and remainders over. No question was raised on this devise.

The testator, after giving several legacies, bequeathed to the above named trustees and the survivor of them, his executors and administrators: All the estates for years to which he was entitled under the will of his brother *James Potts*, together with all his right and interest in the printing and publishing of "*Saunders's News Letter*," and also such estates for years as he was entitled to by his

(a) The limitations are more fully set out in 9 Ir. Eq. Rep. 577.

own purchase and acquirement, to and for the intents and purposes following: "That is to say, as to such terms of years as I am possessed of under the will of my said brother, *James Potts*, and as to my right, title, and interest in and to the printing and publishing of '*Saunders's News-Letter*;' in trust, to permit and suffer the said *James David Potts*, the second son of my brother, *William Potts*, and his assigns, to receive the issues and profits thereof, for and during the term of his natural life; and from and after his decease to permit and suffer each and every of the several other persons aforesaid, to whom an estate for life in the real and freehold estates of my brother, *James Potts*, is hereinbefore limited, successively, and as each of them shall become seized of said real and freehold estates under the aforesaid limitations thereof, to take and receive the rents, issues, and profits thereof, for and during the term of his and their natural life and lives respectively; and from and after the decease of the last of said last-mentioned tenants for life as shall become seized in manner aforesaid, or if none of them shall so become seized, then from and after the decease of the said *James David Potts*, second son of the said *William Potts*, upon trust to grant, assign, and convey, said terms for years, and said right and title to the printing and publishing of '*Saunders's News-Letter*,' to such person or persons as shall then become seized of said real or freehold estates under any of the limitations aforesaid, their executors, administrators, or assigns."

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[As to the terms of years of the testator's own acquiring, he declared similar trusts, but made his nephew *William*, who was the first tenant for life of the real estates of his own acquiring, the first taker of the rents and profits, &c. No question was raised on these trusts.]

The testator having by a codicil to his will (republished therewith) made his nephew *William* his residuary legatee, and appointed him and the said *A. Downes* his exe-

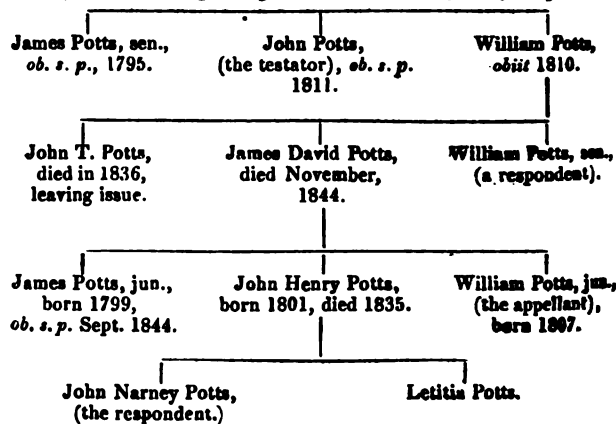
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cutors, died in 1811, leaving his said nephews *John T.*, *James D.*, and *William*, surviving. Probate of the will was granted to *William Potts* alone.

*James D. Potts* had three sons, *James*, *John Henry*, and *William* the younger (the appellant), all living at the testator's death, and born before the republication of his will, *James* having been born before its first execution. *John Henry Potts* died in 1835, leaving one son, *John Narney*, the respondent, then and still a minor. (a)

Upon the testator's death, *James D. Potts* entered into possession of the real and freehold estates acquired by the testator under the will of his brother, and of the rents and profits of the terms for years, and of the two third parts of the profits of "*Saunders's News-Letter*," under the limitations and provisions of the said will. He conducted the "*News-Letter*" in conjunction with his eldest son *James*, until 1832, when he assigned it to *James* and *William* his third son,—for their lives, as the latter alleged. *James* died without issue in *September 1844*, having by his will given all his property, real and personal, to his brother *William*, upon certain trusts, and he appointed him his residuary legatee and executor. *James D. Potts*,

(a) The following Pedigree shows the state of the family:



their father, died in *November* 1844, having by his will left all his personal estate to his son *William*. He obtained probate of both wills, was then registered as sole proprietor of "*Saunders's News-Letter*," and claimed to be entitled to the two-third parts thereof, as well as to the rents and profits of the terms for years under the provisions of the will of his uncle *John Potts*, and as the personal representative of his brother *James Potts*.

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*John Narney Potts*, the infant grandson of *J. D. Potts*, upon his death entered into possession of the real and freehold estates devised by the will of *John Potts*, as derived from his brother *James*; and claiming to be also entitled to the rents and profits of the leaseholds for years, and to two-thirds of the "*News-Letter*" establishment, under the provisions of the will, he by his mother and next friend filed his bill in Chancery, in *Ireland*, against *William Potts*, the younger (the appellant), and *Olivia Handcock*, the personal representative of the survivor of the trustees of the said will, and also (by amendment) against *William Potts*, the elder, nephew of the said testator, and a respondent to this appeal.

The bill after stating the facts as, or to the effect, hereinbefore stated, prayed that an account might be taken of the rents and profits of the lands and tenements comprised in the terms for years, bequeathed as aforesaid by the will of *John Potts*, and of the plaintiff's share and interest in the said printing and publishing establishment, which accrued due since the death of *J. D. Potts*, and had been received by or to the use of *William Potts* (the appellant), and that the same might be secured for the benefit of the plaintiff, and that *Olivia Handcock* might be decreed to convey to the plaintiff the terms for years, and all the right, title, and interest now vested in her, under the provisions of the said will of *John Potts*, in the printing and publishing of "*Saunders's News-Letter*."

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The appellant, in his answer to the bill, admitted the facts therein and hereinbefore stated, and that the respondent *J. N. Potts* had, on the death of *J. D. Potts*, become seised of an estate tail in possession, in the real and freehold estates devised by the will of *John Potts*, acquired by him under the will of his brother; but the appellant, as residuary legatee and executor of *James Potts*, jun., claimed to be entitled to the property comprised in the terms for years and in "*Saunders's News-Letter*," insisting that under the limitations of the will of *John Potts*, and upon his death, the said terms and chattels became vested absolutely in *James Potts*, jun., subject to the life-interest of his father, *J. D. Potts*.

The appellant further submitted that in his own right, as also under the will of his brother, he was entitled to the steam engines, types, &c., and the capital stock brought into the printing and publishing of the said "*News-Letter*," since the assignment thereof to them by *J. D. Potts* in 1832; and that in case the respondent *J. N. Potts* should succeed in establishing his claim to the "*News-Letter*," the appellant was entitled to an allowance in respect of his capital, labour, and personal skill expended thereon, and for the increased value thereof. The other defendants, the respondent *William Potts* the elder—who was made a defendant by order of the Lord Chancellor, as being the only survivor of the persons named tenants for life in the will of *John Potts*—and *Olivia Handcock*, put in their answers, submitting to the judgment of the court.

The Lord Chancellor decreed (*a*) that the respondent, *J. N. Potts*, was entitled to the chattel interests, and to the two-thirds of the "*News-Letter*," absolutely; and referred it to the Master to take the accounts as prayed by the bill, and to inquire into and report the value of the

(*a*) 9 Ir. Eq. Rep. 580.

capital, stock, machinery, &c., belonging to the said printing establishment, and by whom the same had been brought in and erected; and it was ordered that *Olivia Handcock* should convey to the respondent all right and interest in the terms for years, and in the "News-Letter," then vested in her as the executrix of the survivor of the trustees of the will of *John Potts*.

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The appeal was against that decree.

Mr. *Napier* and Mr. *Andrews* (both of the *Irish bar*) for the appellant:

The main question is, whether the chattels—the estates held for terms of years, and the newspaper establishment,—bequeathed by *John Potts*, vested, on his death, in *James*, his eldest nephew, who was the first tenant in tail of the real estates; or whether the vesting was suspended until after the death of *J. D. Potts*, the first tenant for life of the real estates. The chattels were bequeathed in trust to permit *J. D. Potts* and his assigns to receive the profits for his life, and from his death, to permit "each and every of the several other persons aforesaid, to whom an estate for life in the real and freehold estates of my brother, *J. P.*, is hereinbefore limited successively, and as each of them shall become seized of the said real and freehold estates under the aforesaid limitations thereof, to take and receive the rents, &c., during his and their life and lives respectively; and from and after the decease of the last of the said tenants for life, as shall become seized in manner aforesaid, or if none of them shall so become seized, then, from and after the decease of the said *J. D. Potts*, &c., on trust to assign, &c.," the terms and news-letter "to such person or persons as shall then become seized of the said real and freehold estates under any of the limitations aforesaid, their executors, &c."

The true construction of that clause, in the events that



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happened, is, that *James*, the eldest son of *J. D. Potts*, and first tenant in tail of the freehold estates, took an absolute interest in the terms for years and newspaper property; if he did, the appellant, as his executor and residuary legatee, is entitled to them.

The question is, whether the chattels vested in the first tenant in tail simply, or in the first tenant in tail in possession. The principle of the courts is to accelerate the vesting, and leave nothing in contingency that can be held to vest. In *Foley v. Burnell* (a) there was a limitation of plate and other chattels by Lord *Foley's* will, to be enjoyed as heir-looms by the persons who should be in possession of certain freehold houses thereby devised. It was argued that the vesting of the chattels was intended to be suspended until the first tenant in tail of the freeholds came into possession; but Lord *Thurlow* first, and the Lords Commissioners, on a rehearing, held the chattels to have vested in the first remainder-man in tail, an infant, subject to his father's life interest, and, on the infant's death, in the father, as his personal representative. Is not that conclusive on the present case? Lord *Loughborough*, concurring in the opinion before expressed by Lord *Thurlow*, said (a) "if it does not vest in this case, neither would it in a son attaining twenty-one in the lifetime of the father. I do not see it clear that Lord *Foley* could have any idea of a case in which the estate might be sold, and yet the plate remain; but the son attaining the age of twenty-one, might, with the consent of the father, sell the estate. If that case had been stated to Lord *Foley*, he would have said, let them take the plate with the estate;" and so it may be said here, that *James Potts* the first remainder-man in tail, and his father, the tenant for life, might dispose of the whole estate, cutting off the entail. Lord Commissioner *Ashurst* said (b), "The general

(a) 1 Bro. C. C. 274. (b) Id. pp. 280 and 285.

rule is, that when the chattel interest comes to one who would be tenant in tail of land, the limitations over are void. There is another rule that the interest may be so given as not to vest absolutely in the first taker." "The chattels are to accompany the estate—when a tenant in tail comes into *esse*, it must vest, otherwise the absurdity must happen of the personal estate being tied up longer than the real. The testator's intent must be adopted so far as it is legal, and a person becoming tenant in tail must have the absolute interest in the personal property." The judgment was affirmed by the House of Lords (a). That case, and *Vaughan v. Burslem* (b) were commented upon by Lord Eldon in the case of *The Countess of Lincoln v. The Duke of Newcastle* (c) in this House, and the grounds of the decisions explained and approved of.

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But suppose, without admitting, that the ultimate disposition of the leaseholds for years and newspaper property at all rested in contingency, *J. N. Potts*, the respondent, has not become absolutely entitled to them, but the contingency must be held still subsisting for the benefit of the appellant and the other persons who may become entitled to the freehold estates. The meaning of the word *then* in the ultimate limitation, is important. In the case of *Beauclerk v. Dormer* (d), Lord Hardwick says, "in limitations of estates, and framing contingencies, it is a word of reference, and relates to the determination of the first limitation in the estate where the contingency arises." And in *O'Keefe v. Jones* (e), Sir W. Grant says, "A limitation to a man for life, and *then* to his heirs at law, is a fee simple, that word indicating only the order, in which, and not the time, at which, the limitations are to take place."

(a) 4 Bro P. C. 319.

(d) 2 Atk. 311.

(b) 3 Bro. C. C. 101.

(e) 13 Ves. 415.

(c) 12 Ves 231-5.

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There is a recent decision, which bears on this case, *Wrightson v. Macaulay*, in which Vice Chancellor *Wigram* sent a case for the opinion of the judges of the Court of Exchequer (a). The case came again before his Honour (b) upon the answers of the judges and on the equity reserved, when he disposed of the point as to the vesting of the personal estate, as it was disposed of in *Foley v. Burnell*, and his Honour's judgment was affirmed by the Lord Chancellor. They cited *Fordyce v. Ford* (c) and *Stanley v. Stanley* (d) on the same point.

They also contended that the decree, if held to be correct on the principal question, did not contain proper directions respecting the allowances to which the appellant was entitled for his labour and skill in the management of the newspaper.

Mr. *Bethell* and Mr. *M'Causland* (of the *Irish Bar*) relied on the elaborate judgment in the Court below (e), observing that the Lord Chancellor, in deference to the able arguments made for the appellant, entered more fully than one should think was necessary into the law and examination of the cases on the subject. They also cited *Gower v. Grosvenor* (f), in opposition to *Foley v. Burnell* (g), and among other cases *Phillips v. Deakin* (h), and *Doe v. Sprutt* (i); and contended that the testator's leading intention was that the chattel property should vest for life in such of the tenants for life as might become possessed of the freehold estate, in the event of their becoming so possessed on the death of *J. D. Potts*. That intention was effectuated by the construction put on the

(a) 14 Mee. & W. 14.

(b) 2 Hare, 487.

(c) 2 Ves., Jun. 536.

(d) 16 Ves. 491.

(e) 9 Ir. Eq. Rep. 580.

(f) Barnard, 54.

(g) 1 Bro. C. C. 274.

(h) 1 Mau. & Sel. 744.

(i) 5 Barn. & Ad. 740.

will in the court below. The word *then* as used in the will, imported contingency until the period thereby referred to arrived, and that was the death of *J. D. Potts*, so that his eldest son *James*, having died in his lifetime, could have no transmissible interest vested in him.

*Mr. Napier* replied.

*The Lord Chancellor*.—This case has been very ably argued on the part of the appellant, and every thing has been urged to the House, which it is possible to have urged, with a view to impeach the judgment of the court below. But in my mind that judgment is founded upon sound, just, and legal reasoning, and is incapable of being impeached by any argument that has been addressed to your Lordships.

The question that has just been argued is between two tenants in tail, one who died before the property came into his possession by the death of the tenant for life, and the other who has since been put into possession of the real estate under the testator's will.

Now it has been properly admitted that if the intention be clearly expressed in the will, no rule of law can prevent its taking effect. Many cases have occurred which have proceeded upon the ground, that the intention was not sufficiently clear; and when the intention is not sufficiently clear, then there is a rule of law which directs that no property under circumstances of this description is to be held to pass. But if the intention be clear, then it is properly admitted, and cannot for a moment be disputed, that the intention which is so clearly expressed, is to guide those who are to decide between the parties with relation to property of this description.

Now, my Lords, could there be any possible doubt about this? If the cases, which have been quoted, could by possibility have been supposed as being intended to

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overrule an intention clearly expressed, I should only have thought it sufficient to refer to the judgment of Lord *Loughborough* in the case of *Foley v. Burnell*, which undoubtedly is one of the strongest cases that could be referred to on this subject. Lord *Loughborough* there states the doctrine to be this: "The intention ascribed to the will by the plaintiff is not against any rule of law. Lord *Foley* might have given the personal property in such a way as to carry that intention into execution. The only question is, whether this intention appears clearly upon the face of the will. The words are 'as and in the nature of heir looms,' and "that one of the services of plate should go to and be enjoyed by the possessor of *Witley*, and the other by the possessor of *Stoke*. Upon these words the plaintiff's counsel contend that it is clear that it shall not vest in a son of *Edward Foley* during the life of *Edward*." And he then goes on and argues as to the intention appearing upon the face of that will, and he states, as he naturally would, that if the intention appeared clearly in favour of the construction contended for by the plaintiff, the intention must prevail, and that Lord *Foley* might have given the plate; but then he says, "I do not find upon the face of the will any such manifestation of intention, as justifies the court in so dealing with it."

Now, it is clear enough in this and in many other cases, that you may very well guess at what a testator meant, and what he would have done, if he had foreseen the difficulties that might arise in the construction of the will; but courts of law cannot proceed upon a supposititious inclination of intention, they must find the intention expressed in such terms as to enable them to act upon it, otherwise great confusion would arise, and it would be mere speculation as to what the intention of a testator may have been.

'There is no question of law in this case whatever, for all the cases concur in saying that if the intention be clearly expressed, there is no rule of law which can prevent that intention from being carried into effect. Here the testator having real estate to dispose of, gives it to *James David Potts*, his nephew, for life, with remainder to his first and other sons in tail; with remainder to *John* another nephew, and then with remainder to *William* another nephew, with limitations respectively to their first and other sons. Having so disposed of his real estate, the events which have happened are these: *James David Potts*' life estate continued up to *November* in the year 1844; at that period the eldest son of *James David Potts* was dead, he having died in *September* 1814; *Henry Potts*, the second son, was also dead, he having died in 1835, but having left a son, the present respondent, *John Narney Potts*, and *John Narney Potts* being now the tenant in tail, and in possession under that will, says—"I am also entitled to certain personal property," which the testator, in the words I am about to state, gives with his real estate; at least his intention is that it should go with his real estate, and under this disposition the respondent claims.

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The testator after having so given his real estate, describes certain personal property which he leaves "in trust to permit and suffer the said *James D. Potts*, the second son of my brother *William Potts*, and his assigns, to receive the issues and profits thereof, for and during the term of his natural life." So that up to the year 1844, when *James D. Potts* died, there is no question who was entitled to the benefit arising from this personal estate; "and from and after his decease to permit and suffer each and every of the several other persons aforesaid, to whom an estate for life in the said real and freehold estates of my brother *James Potts* is hereinbefore limited successively,

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and as each of them shall become seized of said real and freehold estates, under the aforesaid limitations thereof, to take and receive the rents, issues, and profits thereof, for and during the term of his and their natural life and lives respectively ;” that, of course, alludes to the two other nephews, *John* and *William*, who also had life estates after the death of *James D. Potts*, provided that *James D. Potts* did not leave any issue male to take under the limitations ; “ and after the decease of the last of said last mentioned tenants for life as shall become seized in manner aforesaid, or if none of them shall so become seized, then from and after the decease of the said *James D. Potts*, second son of the said *William Potts*, upon trust to grant, assign, and convey said terms for years, and said right and title to the printing and publishing ‘ *Saunders’s News-Letter*,’ to such person or persons as shall then become seized of said real or freehold estates under any of the limitations aforesaid, their executors, administrators, or assigns.”

Now no one can dispute that upon the death of *James Potts*, which took place in 1844, the person then entitled to the real estate under the limitations of the will was the respondent. He is the person who in point of fact answers the description in the will. The appellant never answered that description, for he was only entitled to an estate in the chattel property, if he became seized of the real estate, and he never became entitled to the real estate, because there being a son of an elder son of *James David Potts*, that descendant took the real estate, and intercepted the limitation under which the appellant would claim the estate. Then what is the construction of law on this point? Were there any persons entitled for life, who became seized of the real estate? Certainly not. Then what does the testator say? “ That if none of them shall so become seized, then from and after the decease of the said *James David Potts*,” it shall go to a person, whose

description is answered by the plaintiff (the respondent) only. What the testator said, is that the said *James David Potts* shall have the estate, and shall be the owner of the chattel property, for life ; and upon his death, if there shall be no person who shall be entitled to the real estate for life, then it (the chattel property) shall go to the person entitled to the real estate under the limitations of the will. Is not that the plaintiff? I can hardly conceive a case which is more clear, or where the expressions used by the testator are more unambiguous. If there is any confusion at all, it arises from the mode of intermixing estates for life, and which in point of fact, looking to this part of the will only, would appear to come from limitations in tail which could never arise at all, if the limitation to *James David Potts* took effect.

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That is the whole of the case. The grounds on which the learned Judge in the Court below has decided this case are, as it appears to me, perfectly unanswerable in point of construction of the will, and not at all met by any of the authorities which have been referred to. We have been referred to cases where there is no clear intention expressed in favour of a particular party, and which all proceed upon the ground that the expressions used did not convey a clear intention in favour of the party.

Under these circumstances, I move that your Lordships affirm the judgment of the Court below.

Lord *Campbell*.—I am entirely of the same opinion. From the explanation which has been given by my noble and learned friend, it appears quite clear to me that the plaintiff (the respondent) is the only party that answers the description of the person who is entitled to the estates mentioned in the will. What is contended for on the part of the appellant might be done by the testator, but



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I cannot conceive language more clear or unequivocal than the expression of his intention the other way. I quite agree in what has fallen from my noble and learned friend, and concur with him in the opinion that the judgment below should be affirmed.

It was accordingly ordered that the appeal be dismissed, and the decree affirmed, with costs.

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|--------------------------|-------|-----------------------------|----------|
| DANIEL LEDSAM and others | -     | <i>Plaintiffs in Error.</i> | 1848.    |
| JAMES RUSSELL            | - - - | <i>Defendant in Error.</i>  | July 11. |

THE assignees of letters patent may, under the first and fourth sections of the 5 & 6 W. IV., c. 83, lawfully obtain a renewal of such patents. *Patent. Pleading.*

The statute does not authorise the Judicial Committee of the Privy Council to impose terms as conditions on which patents are to be renewed. The authority of the committee is limited to reporting on matters as between the public and the party applying.

There is nothing in the statute to fetter the discretion of the Crown in the renewal, except the length of time for which that renewal is to be granted, and which must not exceed seven years.

An application for a renewal is "prosecuted with effect" within the terms of the statute, if the party applying obtains the report of the Judicial Committee of the Privy Council before the expiration of the original patent.

The Crown is not restricted as to the time within which it may act upon such report, and renewed letters patent are not void, because they are dated after the expiration of the original letters patent.

If the Judicial Committee should impose a condition on a party applying for the renewal of a patent, such party need not, in an action for the infringement of the patent, aver that such condition was complied with before the patent was renewed.

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THIS was a writ of error upon a judgment of the Court of Exchequer Chamber, affirming a judgment of the Court of Exchequer. Upon the 26th of *February*, 1825, a patent was granted to *Cornelius Whitehouse* for "certain improvements in manufacturing tubes for gas and other purposes." On the 9th of *April*, 1835, *James Russell* became the assignee of the patent, which was soon after-

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wards the subject of much litigation, but it was finally maintained. In the year 1838, a petition was presented to the Queen, praying for the extension of the term of the patent. This petition was referred to the Judicial Committee of the Privy Council, and the hearing upon it took place on the 12th of *December*, 1838, when the lords of the committee expressed an opinion favourable to the application; and on the same day the committee made a report, formally declaring that opinion. This report was submitted to the Queen, and her Majesty in council, on the 4th of *February*, 1839, approved of it, and ordered the warrant for new letters patent for the term of six years to be prepared. This warrant was signed on the 7th of *February*, 1839, and on the 26th of *February* the new letters patent were duly sealed and issued.

The order on the report of the Judicial Committee recited the reference to the Lords of that committee, and stated "their Lordships do agree humbly to report to your Majesty as their opinion that, in case your Majesty should so think fit, a further extension of the letters patent already obtained, should be granted to the said *James Russell*, in whom the legal interest in such letters patent is now vested, upon the securing to *Cornelius Whitehouse* aforesaid, the original inventor, an annuity of 500*l.* sterling per annum, as long as the said extension of the said letters patent shall last, and that such extension should be for the term of six years from and after the expiration of the term in the original letters patent." The warrant for the preparation of the new letters patent contained the same recital, and both declared her Majesty's adoption of the report, and ordered accordingly.

In *July* 1841, *Russell* filed a bill against *Ledsam* and others, alleging the grants of the original and renewed patents, and charging them with an infringement thereof, and praying for an account. The novelty and usefulness of the invention being disputed, the injunction was re-

fused. *Russell* then commenced an action in the Court of Exchequer, in which he set forth his title as assignee of the patent, the proceedings in the Privy Council, and the renewal of the patent, and averred that "from the making of the said letters patent, the said annuity of five hundred pounds has been duly secured to the said *C. W.*, according to the true intent and meaning of the said letters patent, and of the proviso in that behalf in the said new letters patent contained."

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The defendants pleaded not guilty, and several special pleas; the seventh and ninth of which alone formed the subject of discussion on this writ of error. The seventh plea alleged that the new letters patent were void, as being granted after the expiration of the term granted by the first patent, and the ninth, that the annuity of five hundred pounds had not been duly secured to the said *Whitehouse* from the making of the new letters patent, according to the intent and meaning of the said letters, and of the proviso in that behalf contained.

The cause came on for trial before Mr. Baron *Alderson*, on the 7th of *December*, 1843, and continued till the 4th day, when it was postponed on account of the illness of one of the jury, and resumed on the 24th of *June*, 1844. A verdict was found for *Russell*, but leave was reserved for the defendants to move to enter a verdict for them on the seventh and ninth pleas. *Russell* also had leave to move to enter judgment on the seventh plea, *non obstante veredicto*, in case the court should think that on that plea the verdict must be entered for the defendants. Rules were accordingly obtained, and were argued in Trinity Term, 1845. The court gave judgment for *Russell* (a). The defendants then brought a writ of error in the Exchequer Chamber, where the judgment was affirmed (b). The present writ of error was then brought.

(a) 14 Mee. & W. 574.

(b) 16 Mee. & W. 633.

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The grounds of error relied on here, were, among others, that the 5 & 6 W. 4, c. 83, did not authorise the grant of an extension of a patent to the assignee of the original patentee; that the declaration did not shew that an application for the renewal of the patent was made and prosecuted with effect before the expiration of the original term; that the securing of five hundred pounds per annum to *Whitehouse* was a condition precedent to a valid renewal, and was not shewn to have been performed; that the patent had expired before the grant of the new letters patent, and that such new letters were therefore void; and that these letters patent granted a renewal on a condition subsequent, whereas the recommendation of the Lords of the Committee was for a renewal on a condition precedent, and that the renewal was therefore void.

Mr. *M. D. Hill* and Mr. *Hindmarch* for the plaintiff in error: There is nothing to shew that the application for the renewal of the patent was prosecuted with effect, and, consequently, the Privy Council had no authority to make a report to the Crown, recommending a renewal. [Lord *Brougham*.—I think the matter stands thus: that supposing an application for the renewal of a patent is not prosecuted with effect, according to the statute, though the Privy Council may have the right to make a report, there is no use in making it.] *Bodmer's case* (a), which was decided on the 5 & 6 W. 4, c. 83, s. 4 (b), is an authority for the appellants.

(a) Webs. Pat. Cas. 740.

(b) By which it is enacted, "That if any person who now hath or shall hereafter obtain any letters patent as aforesaid, shall advertise," as therein directed, "that he intends to apply to his Majesty in Council for a prolongation of his term of sole using and vending his invention, and shall petition his Majesty in Council to that effect, it shall be lawful for any person to enter a caveat at the council office; and if his Majesty shall refer the consideration of such petition to the Judicial Committee of the Privy Council, and notice shall first be by him given to any person



In that case there was a petition for renewal presented on the 31st *May*, 1838, and the intention to apply, on the 26th of *June*, for a day for hearing was duly advertised. On that day, two *caveats* were entered, under which each of the parties was entitled to four weeks' notice. The ordinary sittings of the Judicial Committee would, therefore, terminate before the cases could be heard. The Lords, however, specially appointed a sitting for the 17th of *August*. On that day there were not sufficient members to form a committee. The 29th of *November* was then appointed for the hearing. On that day the Attorney General, on the part of the Crown, objected that there was no jurisdiction in the Lords to proceed with the case, as the letters patent appeared to have been granted on the 14th of *October*, 1824, for fourteen years, and the application had not been in the terms of the statute 5 & 6 W. 4, c. 83, s. 4, "prosecuted with effect before the expiration of the term originally granted by the letters patent," for that the statute required more than the petition and the fixing a day for the hearing. The Lords held the objection fatal. That case, therefore, decided that something beyond mere formal matters must be performed, or the party could not be held to have complied with the statute, and that his in-

or persons who shall have entered such *caveats*, the petitioner shall be heard by his counsel and witnesses to prove his case, and the persons entering *caveats* shall likewise be heard by their counsel and witnesses, whereupon, and upon hearing and inquiring of the whole matter, the judicial committee may report to his Majesty that a further extension of the term in the said letters patent should be granted, not exceeding seven years; and his Majesty is hereby authorised and empowered, if he shall think fit, to grant new letters patent for the said invention, for a term not exceeding seven years after the expiration of the first term, any law, custom, or usage to the contrary in anywise notwithstanding; provided that no such extension shall be granted if the application by petition shall not be made and prosecuted with effect before the expiration of the term originally granted in such letters patent."

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ability to do more, though not through his own *laches*, was no answer to the rule which required the report to be made pending the existence of the patent.

[Lord *Brougham*.—By the law in cases of writs of error, they are required to be prosecuted with effect. Would not that rule be satisfied by the plaintiff in error doing what was required of him within a certain time, though the decision did not take place within that time?]

Here it is found as a fact that the extension of the patent was sealed after the original patent had expired. The words “prosecuted with effect” must refer to a result, and that result certainly did not take place “before the expiration of the term originally granted,” but after it.

Then as to the annuity to *Whitehouse*. The securing of that annuity, was by the Lords of the Judicial Committee made a condition precedent to the grant of the renewal of the patent. The applicant himself did not perform all that was required of him, and all that it was in his power to perform as conditions for obtaining a renewal of the patent, for he did not secure this annuity to *Whitehouse*. The non-performance of that condition is an objection to the renewal of the patent, but, even if that condition had been performed, the declaration is bad for not shewing it to have been performed.

[Lord *Brougham*.—Is the Crown so far bound by the report of the Judicial Committee, as to see that every one of its recommendations is carried into effect?]

Certainly; and it would be most dangerous if it should be otherwise. There is a vast difference between the grant of an original patent, and the extension of a patent. The act of the Committee is a judicial act, and the Crown is, therefore, bound by it. The Crown could not grant an extension of a patent contrary to the report of the Committee.

[Lord *Brougham*.—The act says the Judicial Committee may report to his Majesty, and his Majesty is authorised, if he shall think fit, to grant new letters patent



for a term not exceeding seven years. If it was meant that the Crown was to be bound by the report, the act would have said that the Committee should report for what term the extension might take place, and that the Crown should then grant "for such term as aforesaid."]

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That supposition leads the argument to an extreme length. The Committee reports that the Crown may grant a renewed patent for six months. Could the Crown, on such a report, grant it for seven years? It could not. The Crown must act in pursuance of the report, and must see that what has been required by the Judicial Committee, as a condition for the renewal of the patent, has been complied with, and the plaintiff, in a case of this kind, must aver performance of such a condition. The plaintiff in error is entitled here to take any objection to the declaration which in the court below might have been taken on general demurrer, unless the finding on the issue in the court below should prevent him. There is no such finding here. If therefore a condition precedent can be shown to exist, and if the declaration does not show it to have been performed prior to the making of the renewed grant, that is sufficient to invalidate the grant. That is the case with respect to the securing of the annuity. It is clear that the condition must be performed. That is so even in the case of the Crown's prerogative of pardon. If the party pardoned should not perform the condition of the pardon, as for instance that of transportation, the original sentence would be restored to its full effect, or rather the pardon itself would be without effect.

[Lord *Brougham*.—The power of the Crown, in that case, rests on the common law. Here it is the creature of statute, and it has been repeatedly changed.]

But here the statute requires the performance of certain conditions, and in this case there is no allegation of the performance of this condition of the grant of the annuity.



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As that is, even on the face of the warrant for the renewal, a condition precedent to the renewal of the patent, the want of such an allegation makes the declaration defective.

Lastly, it is submitted that as the fourth section of the statute solely refers to the "person who hath obtained or hereafter may obtain letters patent;" and as the whole authority of the Crown to grant a renewal of such letters depends on that section, no such renewal can be granted to the assignee of a patent. The words of that section must be strictly construed; for the power thereby conferred on the Crown is one of a new and exceptional kind.

Mr. *M. Smith* and Mr. *Webster*, for the defendants in error, were not called upon.

The *Lord Chancellor*.—My Lords, I am not at all surprised to find that the judgments of the Courts of Exchequer and Exchequer Chamber were adopted with the unanimous concurrence of the learned judges who were present at the time of pronouncing those judgments; because after attending to all the learned and ingenious arguments which have been addressed to your Lordships' House in support of the case of the plaintiff in error, it does not appear to me that any real doubt can remain as to the propriety of the decision of the court below. It appears in the case of the defendant in error, that the plaintiff in error intended to take only two points, it being stated, "Take notice, that a writ of error has been allowed in this cause, and that the following are the grounds of error which will be argued:—First, that on the seventh plea judgment has been given for the plaintiff, notwithstanding the verdict found for the defendants on the same plea, whereas such judgment should have been given for the defendants; the same plea, and the matters therein stated, disclosing a valid defence in the law, viz., that the letters patent in the declaration secondly stated, were granted after the expiration of the term of fourteen years,



granted by the letters patent in the declaration first mentioned: Secondly, that the declaration is insufficient, a prolongation of the term granted by the original letters patent not being, by law, at the time of the granting of the letters patent, in the declaration secondly mentioned, capable of being granted to the assignee of the original letters patent."

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Those were the two points that originally were intended to be brought under the consideration of this House. They have since been added to by a supplementary paper, by which another reason has been assigned, namely, "That the declaration shows that the recommendation by the Judicial Committee to her Majesty to grant an extension, was conditional upon the plaintiff below first securing an annuity to a *Cornelius Whitehouse*, the inventor. The condition contained in the report of the Judicial Committee being therefore a condition precedent, the new patent is void, if it was not performed previous to the making of the patent, and the declaration is bad, because it does not show that the condition was so performed."

Now, my Lords, upon the first points which were originally intended to be taken, it is clear that they must turn upon the construction of the act of Parliament, and all the clauses necessary to be adverted to for the purpose of showing that the construction put upon the act by the court below is correct, are the first and the fourth sections.

By the first section it is enacted, "That any person who, as grantee, assignee, or otherwise, has obtained, or who shall hereafter obtain letters patent, may, if he thinks fit, enter a disclaimer of any part." The object of referring to that clause is that it takes notice of the person to whom the letters patent are granted, whether he be grantee, assignee, or otherwise, of the patent.

Then you come to the clause in question, the fourth, which provides "That if any person who now hath, or shall hereafter obtain, any letters patent as aforesaid." The first

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question raised is, to what does the word "aforesaid" refer? The judges in the court below have construed it to refer to the description of persons entitled to the letters patent, that is to say, to the persons who, as grantees, assignees, or otherwise, may be entitled to the letters patent; and that appears to be the only construction by which any sense can be derived from the words so used—those are the persons "aforesaid." If we look through the prior part of the act of parliament, we do not find any person entitled to the benefit of the patent, except those described in the first clause. The first clause does contain a description of the persons who are entitled to the benefit of it. Then, if that be so, this clause must be read thus:—"That if any person who now hath or shall hereafter obtain any letters patent, or who is grantee, assignee, or otherwise, thereof," and that would dispose entirely of one of the grounds upon which this matter is brought under your Lordships' consideration.

Then we come to the other and far more important one, which is, the fact of the new grant not having been made until a day after the period at which the first grant would expire, because, although it bears date the same day, yet there is a day between the expiration of the former grant and the day when the new grant was made.

It is said that the clause of the act of Parliament does not authorise the Crown to grant new letters patent after the period at which the former letters patent have expired, and, consequently, that the Crown has exceeded the power given to it under the act of Parliament, which was merely the power under certain circumstances, according to the terms of the act, of granting new letters patent for the protection of the patentee during a certain period.

The conclusion of the section is that the Crown is to be at liberty to refer the petition to the Lords of the Judicial Committee of the Privy Council, who are to make a report to the Crown. It provides the mode in which the Judicial

Committee of the Privy Council is to hear the application, and after hearing it, to make a report; and we find these words [His lordship read the section, see *ante* p. 690.]

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In order to authorise the Crown to grant an extension of the term of any letters patent, according to the terms of this clause, there must be a report of the Judicial Committee of the Privy Council in favour of such extension of the letters patent. When the report has been so made, the only limit to this discretion of the Crown is, that the renewal shall not exceed the term of seven years from the period of the expiration of the first patent. There is no limit upon the discretion of the Crown, or the right of the Crown in renewing the letters patent, further than that restriction as to the period of seven years. The Crown cannot be bound beyond the terms of the act of Parliament. The act imposes no other limit upon the Crown than the period for which the new letters patent are to be granted. Therefore if there was any doubt as to the construction of the act generally, or if it was capable of being construed in the way contended for by the plaintiff in error, it appears to me that this clause removes all doubt, because the proviso does not apply to what the Crown is to do, but it applies to the right of the party asking for the extension of the patent. It is, "provided that no such extension shall be granted, if the application by petition shall not be made and prosecuted with effect before the expiration of the term originally granted in such letters patent."

The question is, to what extent does the expression "expiration of the term," limit the authority of the Crown given by this notice? Does it limit the power of the Crown? Certainly not. What then does it do? It prevents the party from taking the benefit of the act of Parliament unless he does something. In order to entitle himself to have the benefit of the new grant of letters patent by the Crown, he must make the application for that new grant, and prosecute the application with effect

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before the expiration of the term originally granted in such letters patent. In this case he did so. He applied before the expiration of the term originally granted in such letters patent, and he proved his case to the satisfaction of the Judicial Committee of the Privy Council; and the Committee made a report that a further extension of the term in the said letters patent ought to be granted. It is not possible, looking through the whole of this clause, to find any restriction upon the power of the Crown with respect to the granting of new letters patent for a period not exceeding seven years. That has been the construction of the Court below, and it is the only possible construction which, consistently with the terms used by the act of parliament, could have been adopted. That being the case, that objection has no foundation whatever.

I have already disposed of the other point, namely, the question as to the assignees and grantees. I have said that the construction to be put upon the fourth clause ought to be that the party intended to be described here by the word "aforesaid," may be a grantee or assignee, a party competent to enjoy or obtain the benefit, a party who has patent rights, which he may be disposed to apply to the Crown to have further extended.

Then comes the last and only remaining point, namely, that the Judicial Committee of the Privy Council intended by the report to her Majesty, that there should be a provision made, before the granting of the new letters patent, to secure a certain sum to *Cornelius Whitehouse*, the inventor, and that the declaration does not state that that was done.

What the declaration does state upon that subject is this—"That from the making of the said letters patent, and thence hitherto the said annuity of 500*l.* sterling *per annum* has been duly secured to the said *Cornelius Whitehouse*, according to the true intent and meaning of

the said letters patent, and of the proviso in that behalf in the said new letters patent contained."

In the view which I take of this case, it is not material in what way it is stated in the declaration, because I can find nothing in the Act of Parliament which authorises the Judicial Committee of the Privy Council to impose any terms, or to make any recommendations to his Majesty with respect to the parties seeking for the grant of the new letters patent, except the fact of whether the letters patent shall be extended or not. The payment of this 500*l.* is a matter between the assignee and the original inventor. What the Judicial Committee is to report upon is merely as to matters between the public and the party applying, whether the party applying for the new letters patent has made out a case as against the public to have the old letters patent renewed. But as to imposing any condition upon the Crown, which has otherwise the right to make the grant, there is nothing in the act to restrain the Crown from exercising any discretion it pleases. If this objection could prevail, it would be upon this ground, that the Crown had no right to make the new grant unless upon the terms recommended by the Judicial Committee, in other words, that if terms were recommended by the Judicial Committee, the Crown must be bound by them. If we look to the act of Parliament which regulates the mode in which the Crown is to exercise the right of granting an extension of a patent, there is nothing that I can find in any of the clauses of the act, which at all interferes with the discretion of the Crown. If there is any matter in dispute with respect to the patent which is brought before the Judicial Committee, the right of the Crown is not restricted or confined by any thing which that Court has done. What the Act of Parliament meant the Judicial Committee should do, was merely to recommend that the Crown should grant an extension of the term, or not, and if an extension was

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recommended to be granted, then it was to be kept within certain limits. That is the only restriction which the Act of Parliament imposes upon the Crown.

Upon these grounds, my Lords, I think that the judgment of the Court below should be affirmed.

*Lord Brougham.*—My Lords, I entirely agree with my noble and learned friend. As the act of parliament is one which was drawn by myself, and which vests certain powers in the Judicial Committee of the Privy Council, or rather in the Crown, I think it much better to rest the construction of that act upon the opinion of my noble and learned friend, than to give my own opinion upon it; but at the same time I cannot avoid adding that my opinion is very clear upon the point. I might state what was my intention when the act was introduced; but I will not do so. We have now only to consider the points that have been brought before us; and I shall not say any more upon the act than what appears to me to be its proper construction. I repeat that I entirely agree with the opinion which my noble and learned friend has expressed. I have every reason to believe that the legislature itself, and not merely the individual who framed the act, meant that the Judicial Committee was to do something, namely, to inquire into the expediency of the granting the renewed letters patent; (I am not speaking from any supposition of intention, but with reference to the words of the act itself;) and when the Committee had done that, the rights of the Crown would remain the same, with the limitation only of the period of seven years, as that within which the renewal of the patent, if made, must be restricted.

I entirely agree in the construction which has been put upon the act of Parliament in the Court below by the unanimous judgment of the Court of Exchequer Chamber, from which this writ of error is prosecuted before your

Lordships; and I am of opinion that on the first point there can be no doubt that the plaintiffs in error are not entitled to the judgment which they seek.

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Upon the second point also I have no doubt at all. When we come to construe the act of Parliament, and to look at the points which have been raised by the counsel for the plaintiff in error, however ingeniously they may have been raised, I consider it would be a waste of time to call upon the counsel for the defendant in error for an answer to those points. The second point is with respect to the limitation of the time, and is this, that the old patent should not have been allowed to expire before the new patent was granted, because a grant of a new patent, after the original is at an end, cannot be called an extension. When we come to construe the act of Parliament with respect to that, I do not think it requires that the old patent should not have expired before the renewal was actually granted. There is no pretence for saying that the act of Parliament binds the Crown to act upon the application of a party requiring a renewal of the patents, before the time when the old patent has expired. The Act requires that the party should have proceeded to prosecute his claim in a certain way; that he should have prosecuted it with effect before the expiration of the term, and there is an obvious reason for that, because it might happen that the Judicial Committee which is to hear the evidence and make the report, might, after hearing the evidence of the party petitioning, be of opinion that there was not sufficient ground shown for the renewal of the letters patent; and therefore it is that the party must take the step of prosecuting his claim with effect before the Judicial Committee, before the renewal of the letters patent can be allowed by the Crown. That is the only limit. Has he done so here? It seems to me that he has. Then having done so, that is all that he is required to do:



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that is one of the limitations upon the Crown in granting the prayer of the petition for the renewal of the letters patent. The other limitation is that it shall not be for more than seven years; it is not to exceed seven years after the expiration of the first term.

Then as to the securing of the annuity to *Whitehouse*. The Crown has nothing to do with any agreement between individuals, it has only to do with this, that the grant shall be to the first and true inventor thereof (that is, of the thing patented) or his grantee or assignee at the time. The other proviso is that it shall not be for more than seven years. Monopolies are now abolished, and, therefore, what is provided for in the new Act is that the Crown shall have the power, upon the recommendation of the Judicial Committee, to extend the period for the term of seven years only. But I do not think that the Crown is bound to grant the renewal of the patent in the very terms that are stated in the report of the Lords of the Privy Council, or to see that the terms mentioned in that report have been complied with.

I entirely agree with all the learned Judges of the Court below, and, I think, that as this writ of error has been prosecuted, we shall do well to give judgment, and I recommend judgment to be given for the defendant in error, with costs.

Judgment affirmed, with costs.

CECILIA FULHAM, MARGARET LYNCH, AND }  
 MARIA M<sup>c</sup>CARTHY - - - - } *Appellants.* 1848.  
 July 14, 17, 25.

JOHN M<sup>c</sup>CARTHY (Administrator of ALEX- }  
 ANDER M<sup>c</sup>CARTHY), CATHERINE M<sup>c</sup> } *Respondents.*  
 CARTHY, and Others - - - - }

PARTIES having adverse or inconsistent rights in the subject matter of a suit, cannot be joined as co-plaintiffs. (*Infra*, p. 715.)  
 Nor can a party who has no interest, be joined as a plaintiff with one who has. (*Infra*, pp. 716 and 722.)

*Pleading.*  
*Misjoinder.*  
*Issue.*

Therefore, where one of the next of kin of an intestate, after assigning her distributive share of his estate, is joined, as co-plaintiff with the assignees in a bill against the administrator and the other next of kin, for an account and payment, there is a misjoinder of plaintiffs, of which the defendant may take advantage at any stage of the cause, and such misjoinder will, even on the hearing, be sufficient to occasion a dismissal of the bill.

In a suit in which an assignor and the assignees of an equitable interest are made plaintiffs, an issue directed to try the validity of the deed of assignment is improper, as being an issue between co-plaintiffs, and not between them and the defendant.

*Quare*, Whether an assignment of property by a nun, in pursuance of a vow made on entering the convent, is valid.

—♦—  
 THIS was an appeal from a decree of the Lord Chancellor of *Ireland*, in a suit instituted there for the purpose of obtaining payment of two distributive shares of an intestate's personal estate. (*a*)

*Alexander M<sup>c</sup>Carthy*, of *Cork*, merchant, died intestate, in *July* 1843, leaving a large personal estate and ten children, five sons and five daughters, his sole next of kin him surviving. He also left a widow, but she was, by a proviso in their marriage settlement, excluded from any share in his personal property.

(*a*) 9 Ir. Eq. Rep. 620.

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Two of the intestate's daughters, *Maria McCarthy* (appellant) and *Catherine* (a respondent), in his lifetime and with his approbation, became professed nuns, of the *Ursuline* order, in a religious house or convent, at *Blackrock*, near *Cork*, and he paid, for each, one thousand pounds to the convent, as her portion, that being about if not more than, the sum usually paid on the entry of persons of their station in life into the convent.

It is a rule of all the convents of the said order, that any property to which the nuns become entitled, after being professed, becomes the property of the community of their convent.

Soon after the intestate's death, *John McCarthy*, one of his younger sons, obtained letters of administration of his estate in the proper Ecclesiastical Courts in *Ireland* and *England*, and other countries where parts of the estate had been invested. Having possessed himself of the assets, to the amount of 90,000*l.*, after payment of debts &c., he distributed their respective shares among all his brothers and sisters, except the said *Maria* and *Catherine* to whom he made no payment. Some attempts at an arrangement with them, whereby their shares might be divided among their four younger brothers,—the eldest being amply provided for by the real estate, in addition to his share of the personalty,—were unsuccessful.

In *December* 1843, *Maria McCarthy* executed an assignment of all her share of the intestate's estate to the other appellants, *Cecilia Fulham* and *Margaret Lyn*, professed nuns of the same convent, their executors, administrators, and assigns, as trustees for themselves and the other members of the convent, with power to complete payment, and give receipts, and put in answers for her Chancery, &c. *Catherine McCarthy* executed a similar deed of assignment in *March* 1844.

The assignees (the two first-named appellants) and *Maria* (the other appellant), one of the assignors, filed

bill in Chancery, in *July* 1844, against the said administrator, and the other sons and daughters of the intestate, including *Catherine*, who declined to join as plaintiff, although she concurred in the object of the suit. All the other members of the convent were made formal defendants. The bill, after stating to the effect above mentioned, prayed that accounts might be taken of the debts of the intestate, and of his personal estate and effects, &c., and that the appellants might be declared, in right of *Maria* and *Catherine*, entitled to two equal tenth shares thereof; that the amount of such two shares might be ascertained, and that each of the respondents, the sons and daughters of the intestate, except *Catherine*, might be decreed to pay to the appellants, *Cecilia Fulham* and *Margaret Lynch*, as assignees of *Maria* and *Catherine*, a proportional part of the assets of the intestate, which had been paid to them respectively by the administrator, and that they (the said assignees) might be declared entitled to a lien upon such assets of the intestate as were still subsisting in specie, for satisfaction of the full amount of the distributive shares of the said *Maria* and *Catherine*.

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The defences made by the several answers of the administrator and the intestate's other sons and daughters, except *Catherine*, were that the sums of 1000*l.* and 1000*l.* paid on the profession of *Maria* and of *Catherine* respectively, were understood and intended by them and their father to be their full portions; and they were barred by the arrangement then made from any further claim on him or his estate; that the deeds of assignment executed by them, were extorted from them by undue influence and coercion, and were therefore void in equity; that even if the assignments were truly executed, it was contrary to public policy to give effect to instruments executed in obedience to religious vows, and disposing of property to religious uses at the will of a superior, without regard to

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the moral or civil obligations of the parties making such vows; that *Maria* and *Catherine* being professed nuns at the time of executing the said assignments, they were in a state of civil death, and incapable of acquiring or disposing of any property.

An answer put in for *Catherine McCarthy*, without oath, by consent, stated that she was desirous to have her share of the intestate's property applied to the purposes of the convent, and that she executed the assignment in order that her share should vest in the assignees for the said purposes; and that, although she concurred in the objects of the suit, she declined to be a plaintiff therein, as she had no wish to be engaged in litigation with her brothers.

A great body of evidence was taken on both sides.

The Lord Chancellor, upon the hearing of the cause, offered the plaintiffs an issue to try whether the deeds of assignment were executed by *Maria* and *Catherine* of their own free will; and their counsel declining the issue, his Lordship decreed "that the Court offering to direct an issue at law to try whether the two deeds of assignment in the pleadings mentioned, bearing date the 29th day of *December*, 1843, and the 13th day of *March*, 1844, were respectively executed by the said plaintiff, *Maria McCarthy*, and the said defendant, *Catherine McCarthy*, as free agents; and the counsel at the bar for the said plaintiffs declining to take such issue, they insisting that without any such being directed, the plaintiffs were entitled to a decree; and it appearing to the Court that the said deeds were not, nor was either of them, executed by the said plaintiff, *Maria McCarthy*, and the said defendant, *Catherine McCarthy*, as such free agents, but that, on the contrary, the same were executed by them respectively not of their free will, but under the pressure and compulsion of the vow of obedience taken by them respectively on becoming professed

members of the convent in the pleadings mentioned, and wherein they then still remained as such members, and under the obligation of the said vow; the Court doth declare that no relief ought to be given by the Court, founded on deeds so obtained, and thereupon his Lordship doth dismiss the plaintiffs' bill, with costs, to be paid by the plaintiffs, *Cecilia Fulham* and *Margaret Lynch*, without prejudice to any suit which the plaintiff, *Maria McCarthy*, or the respondent, *Catherine McCarthy*, may be advised to institute as the next of kin of their father, *Alexander McCarthy*, deceased."

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The appeal was brought against that decree.

The case was argued on the questions of undue influence, public policy, and misjoinder of parties. The last was raised by the sixth reason for the respondents in these terms:—"Because, upon the bill as framed, there was a misjoinder of parties, inasmuch as the said *Maria McCarthy*, who was alleged to have assigned all her interest (if any), in the assets of her said father, had rights and interests conflicting with the claims of the said *Cecilia Fulham* and *Margaret Lynch*, with whom she was joined as co-plaintiff." As the judgment was confined to this last question, the arguments on the others are not reported.

Mr. *Turner* and Mr. *Bethell* (Mr. *Chisholm Anstey* was with them) for the appellants: The decision in this case did not proceed on the misjoinder. The Lord Chancellor thought that the case was before him on the merits and on the principles of law, and on them he decided it. In this view of the case he was right, for the case was before him on the merits; but he was wrong in the construction he put on the case as then presented to him. At all events, no question of misjoinder was raised, nor could it be, for there has not been any misjoinder here. The plaintiffs had not conflicting interests. On the contrary, as against the brothers

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and sisters who had received distributive shares of the father's estate, they were united in a common interest. The Court has no right to anticipate their possible disagreement. The Court cannot stay to inquire whether, when the daughter *Maria* has been declared entitled to her share of her father's personal estate, she may dispute the deed of assignment, and so to conjecture a possible conflict of interest among these co-plaintiffs. All that can be asked is, whether the co-plaintiffs have now a common interest under this bill in asserting her rights? The answer must be in the affirmative. They have a common right, and a joint interest against the brother, the administrator, and the rest; and having such an interest, they may join in enforcing it. *Campbell v. Dickens* (a), is a clear authority in favor of the bill as it now stands. There the assignee of a legatee was held to be a necessary party to a suit brought by the legatee for the recovery of the legacy, where the assignment took place before the institution of the suit. The same rule was held in *Humble v. Shore* (b), where a suit was instituted to administer and ascertain the residue of an estate, and one of the residuary legatees, after the bill was filed, and before he was served with the subpoena to appear and answer, assigned his share. It was held that he was a necessary party to the suit. The principle adopted in those cases must govern the present.

Sir *F. Kelly* and Mr. *Rolt* (Mr. *Napier* and Mr. *Hetherington* were with them) for the respondents:

The bill here improperly mixes a legal chose in action with an equitable claim to a share of residue. This is a mistake of interest. It is not a legal chose in action which is claimed, but an equitable chose in action, vested in two of these plaintiffs by assignment. The parties who claim the chose in action, and the parties who claim the share

(a) 4 *Younge & Collicr*, 17.      (b) 3 *Hare*, 119.

of the residue being different parties, and having different interests, there is a misjoinder of parties in making them co-plaintiffs. This alone was sufficient to call on the Court below to dismiss the bill, and justifies its dismissal. The authorities cited on the other side, to shew the necessity of joining the assignor and assignee as parties to a bill, do not apply to this case, and do not justify the purpose for which they are cited. In *Campbell v. Dickens* (a), the legacy was expressly charged on land; and in *Humble v. Shore* (b), there was, though it is not mentioned in the report, an outstanding interest in the assignor. It was, therefore, absolutely necessary to make him a party to the suit. There too, as in the previous case, a legal interest was assigned. Here the assignment is that of an equitable interest alone; and where the holder of an equity assigns the whole of his interest, and the assignee could establish his title by proof at law, it is not necessary to make the assignor a party to the bill.

[The *Lord Chancellor*.—The assignment of all interest in a mere equity would leave nothing in the assignor. Is that so here?]

It is; and that shews that the assignor and assignee in this case ought not to have been joined as co-plaintiffs. In the case of *Cator v. The Croydon Canal Company* (c), it appeared that a party, who believed himself entitled to compensation under the act for making that canal, assigned his interest before the award was made. Mr. *Baron Alderson* held that this assignment might be made, but that the assignor need not be a party to the bill filed by the assignee for the recovery of the money, he not having then any legal title to it. The principle to be found in that and other cases is, that if a legal chose in action is assigned, the assignor may join in the suit; but

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(a) 4 You. & Col., 17.

(c) 4 You. & Col. 405.

(b) 3 Hare, 119.



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not so if a mere equitable interest is assigned. Here the interest was purely equitable.

[The *Lord Chancellor*.—May not the assignor remain a trustee, and if so, may he not be required as a party to the cause?]

Not necessarily. Some light is thrown on this matter by reference to the case of *Bill v. Cureton (a)*. In that case there was a settlement by a single woman in trustees for her own benefit. In a bill, afterwards filed by her for the purpose of setting aside this settlement, the mortgagee of her interest under it was joined as a co-plaintiff. It was held that he could obtain no relief in such a suit. In giving judgment there, the Master of the Rolls said,—“The purchaser not having the protection of the statute 27 *Elizabeth*, because there was a settlement of personal property only, cannot have a better title than the settlor from whom he purchased; and if he had a good title in himself, he can have no relief in the suit, having associated himself as a co-plaintiff with the settlor; it having been, in several late cases, decided that under such circumstances no decree can be made, although the plaintiff might, in a suit in which he was sole plaintiff, have been entitled to relief.” Here it is clear that the assignor has no interest in common with, but only adverse to, the assignees, and yet she is made to appear as a plaintiff in respect of an interest, which, if fraud and undue influence did not impeach the transaction, she had entirely transferred to others. This is erroneous in any view of the case. Assuming that the assignment is void, then her interest is adverse to that of the assignees. Assuming, on the other hand, that the assignment is valid, then her interest is entirely gone, and having none, she cannot be allowed to influence that of others. The case of the *King of Spain and others v. Machado (b)*, decided that if of several plaintiffs,

(a) 2 Myl. &amp; K. 503.

(b) 4 Russ. 225.

some have an interest in the matter of the suit, and others have no interest in it, but are merely the agents of their co-plaintiffs, a general demurrer to the whole bill is a good defence. *Cuff v. Platell (a)*, is to the same effect. Both these cases were decided on demurrer, and it must be admitted that that makes some difference. But other cases establish the same point. In *Jacob and others v. Lucas (b)*, the personal representative of a deceased trustee, together with infants beneficially interested in a fund, were co-plaintiffs in a suit, the object of which was to make the tenant for life, and his interest in the trust funds, answerable for part of the trust funds which the tenant for life had applied to his own use. There were other parties interested in the restitution of the fund who were made defendants. The Court being of opinion that the trustee's assets might, in the progress of the suit, have to be resorted to for the purpose of making good a breach of trust, and that the interests of the personal representative and of the infants would thereby alternately become conflicting, dismissed the bill with costs, on the ground of the misjoinder of the plaintiffs, but without prejudice to any new bill. The same principle was acted on in *Hunter v. Richardson (c)*.

The case here presents itself in an alternative point of view. Either the assignment is good,—is made without undue influence,—and then it must be sustained; or it is bad, and then the assignor's rights must be restored. When the importance of the question is considered, whether *Maria* ought not, so far as a Court of Equity is concerned, to have her rights kept alive, it is plain that she ought to have the opportunity, as a defendant, of stating objections to this assignment, and not to be prevented from making them by being put into the bill as a co-plaintiff. On this ground alone the bill ought to be dismissed. This view

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(a) 4 Russ. 242.

(b) 1 Beav. 436.

(c) 6 Madd. 89.

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of the case is justified by the authority of *Wake v. Parker* (a). There a bill was filed by husband and wife and their infant children by their father, as next friend. The bill prayed for the administration of the estate of a testator under whose will the wife was entitled to separate estate. There was a demurrer on the 'ground of misjoinder, and the Court held the demurrer to be good, and gave leave to amend, by inserting a next friend for the wife and children, and making the husband a defendant. The various interests of the different parties were there ascertained and acted on, and the possible conflict among those interests properly provided for. A similar rule must be applied in this case, and the bill, as now filed, must be dismissed.

Mr. *Turner* in reply.—If this House should act upon what appears on the face of the bill, it will exercise an original and not an appellate jurisdiction. This bill does not set forth a title in either of the original parties: it sets forth a title in trustees for the benefit of the members of a community, of which *Maria McCarthy* is one. There can be no objection to a bill filed by the trustees and the *cestui que trust* for the purpose of recovering from the administrator, who has the control of the property, money which he ought to pay to one or the other. The bill shews the principals of the convent to be trustees, and to sue as such. If *Maria McCarthy* had claimed an adverse interest to the trustees, it would have been necessary that the members of the convent should be called on to answer. But here her interests are the same as those of the trustees, for she appears not merely as the assignor, but as a *cestui que trust*. It is necessary that the assignor should join in the bill, since the title of the trustees, as such, is disputed. This itself is an advantage to the

(a) 2 Keen, 59.

administrator, the holder of the fund, since by the decision in this suit, and without further litigation, the assignor as well as the assignees will be bound. The administrator might otherwise say that he could not pay because the validity of the assignment was in dispute between the assignor and the assignees. It is said on the other side that the assignor has no right or interest, if the assignment is valid. But why has not the assignor an equitable interest in the suit for enforcing her own assignment? Because it is said that the assignment is fraudulent. But if the assignor appears and says that it is not fraudulent, it does not lie in the mouth of the defendant to say that the assignor has no interest and cannot be heard—

[*The Lord Chancellor.*—They do not say that *Maria McCarthy* has no interest, but that she has an adverse interest.]

That objection cannot be heard from the administrator, whose only interest is that he should be enabled with safety to pay what is undoubtedly not his to retain, but what belongs either to the assignor or assignees.

But how does the case stand with regard to *Catherine*? She too has made an assignment. She is not a plaintiff but a defendant; she admits the assignment, and desires that effect should be given to it; and then the Court says, effect cannot be given to that assignment as against you. The Court dismisses the bill, and decides in substance that the deeds are void as against the parties who declare their desire to see those deeds receive their full effect. Such a decree is entirely without precedent. It is a new head of equity to hold that, in a bill by *M.* and her assignee, against an administrator, who is bound to pay to somebody money which is due to all, he may set up a question of right as between *M.* and her assignee. The joinder of these parties as plaintiffs is for his protection, and cannot be objected to by him.

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It is quite plain that the decree is wrong. The course should have been,—if there was a misjoinder of plaintiffs—not to dismiss the bill, but to allow it to be amended, by making *Maria* a defendant; and then the administrator and the party seeking to impeach the deeds should have been required to file a fresh bill, and the hearing in the first cause should have been suspended till both could have been taken together. As the decree now stands, it must be reversed.

July 25. The *Lord Chancellor*.—This case, which, no doubt, if we were in a situation to deal with the merits of it, would be one of considerable nicety, must, in the view I take of it, be disposed of without at all entering into or discussing any question on the merits, which may ultimately arise between the parties.

The bill was filed by parties claiming, under an intestacy, distributive portions of the intestate's estate. One of the plaintiffs had entered into a convent, the rules of which appear to have been, that any party becoming a member of that society should devote all the property either in possession, or which might thereafter come to the party so entering the house, for the benefit of the establishment. It appears that after the plaintiff had entered into this religious house, this property devolved upon her, upon which event happening, she, in pursuance of the rule of the house, and of the vow which she had been called upon to take upon entering the house, executed a deed by which that property was transferred to two members of the society, the other plaintiffs, for the benefit—though not expressly upon the face of the deed acknowledged to be for the benefit—of the establishment.

The party administering the estate from which this money was to come, being a brother of the individual upon whom it had devolved, and who' had so become a

member of the religious house, very naturally felt reluctant to transfer the property, to which his sister was entitled for the purposes to which it appeared to be devoted. Accordingly difficulties were made, and as the sister could not enjoy the property in consequence of those difficulties, arising from the rules of the religious house, and the vow into which she had entered, the rest of the family became anxious that, if she renounced the property at all, she should renounce it for the benefit of members of the family. This raising a difficulty to the obtaining payment of what would ultimately have belonged to the sister, if she had not entered into this religious house, and which does still belong to her, unless she thinks proper in an effectual manner to dispose of it, the bill is filed, not merely by the party entitled to the money under the intestacy, but also by the persons to whom it was assigned. It is in fact a suit in which they concur as co-plaintiffs; and—what is singular enough, as shewing that the party who prepared this bill must have been aware of the difficulty arising from such a joinder of plaintiffs—the bill sets out the objections made by the rest of the family, and makes the defendants object to the validity of the assignment; and then the bill goes on to charge that it was a proper assignment, that there was no objection to that vow or that undertaking to which the party had come, and that the members of the society for whose benefit that obligation was imposed had a right to the property coming to that individual, and which had been assigned to them in pursuance of that vow. That, however, could make no difference, and therefore it was quite unnecessary to raise that question, because, if the co-plaintiffs, the assignor and the assignees, had properly joined in order to compel payment of this money, it became quite unnecessary to the issue between them and the defendant, the intestate's personal representative; for if they together were competent to sue and to assert their right against the

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personal representative, the latter could make no objection to the validity of the assignment, and it was therefore, in fact, raising an issue between the co-plaintiffs, which was unnecessary for the purpose of the litigation between the plaintiffs and the defendant.

When this cause was before the Lord Chancellor of *Ireland*, he was struck, as well he might be, by the position in which the party, a young female, is placed, who, having entered a religious house, is called upon, in virtue of her vow, to transfer all the property to which she might become entitled, for the benefit of the establishment into which she has entered; and thinking that he saw traces, at least, of undue influence, arising from the position in which the party had so placed herself, he declined to administer the claim made on the part of these co-plaintiffs, without resorting to a mode by which, as it appeared to him, the validity of the assignment might be tried. He therefore proposed to direct an issue to try whether the assignment had been executed at the free will of this young person who had entered into this religious house. The issue was not accepted. From the decree, dismissing the bill under those circumstances, this appeal comes to your Lordships' house.

Now, it certainly appeared to me, that whatever ground there might be, and in my opinion really existed, for the difficulty which the Lord Chancellor of *Ireland* felt in giving effect to this transaction, the mode in which he attempted to get over the difficulty, by enabling the parties to ascertain what their rights really were, was one which was not quite consistent with the course and practice of Courts of Equity; because it appears to me, that this was an issue between the co-plaintiffs, and not between the plaintiffs and the defendant; and that the defendant was equally bound, whether the assignment had been properly

executed or not; that he was equally responsible, as the personal representative of the estate, to pay the money to the party entitled, whichever it might be. It might well be that the administrator, seeing the position in which his sister had placed herself, was reluctant to pay over the legacy, knowing the purpose to which it would be applied. If the return to the issue, offered by the Lord Chancellor, had been that the deed of assignment was properly executed, of course, the defendant would have been obliged to pay the money. But he is equally bound, whatever may be the validity or invalidity of this deed, to pay to one or other of the plaintiffs, either to the party originally entitled, or—if it should appear that this transaction is not capable of being impeached—to her assignees, the trustees of the religious house. Therefore, it does appear to me that this mode of trying the question was one which ought not to have been resorted to, and which in its results could produce no beneficial fruits. It is singular enough to have an issue directed where one party has no interest in the matter. The defendant had no interest in the issue thus framed. He could have no interest in the result of the trial; he has nothing that he can claim for himself; he has property belonging to his sister in his hands to be made over to her or to persons claiming through her; therefore I expressed, at the hearing, my opinion that that part of the decree could not be maintained.

But then, another question is raised here, which does not seem to have been much adverted to in the Court below, but which appears to me to be fatal to the present suit. The position of the parties is this:—If the transaction between the sister and the religious house be a valid transaction, then the bill ought to have been filed by the trustees of the religious house. It is not an assignment of a legal right, it is an assignment in equity of a purely equitable interest; in which case, as Mr. *Turner* very properly admitted at the bar, the course of practice of Courts of

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Equity is to file a bill, not by the assignor, who, if the assignment be valid, has no longer any interest in the property assigned, but by the party claiming as assignee. If the assignees, that is, the trustees of the religious house, had filed a bill, then the defendant would have an interest in the question on the issue, because every defendant has an interest in shewing that the party suing him has no interest in the subject-matter of the suit; and it would be a perfectly valid course of defence to shew that this deed was not a deed which a Court of Equity could recognize as giving a beneficial interest to the party claiming under it. But the plaintiffs were afraid of putting themselves into that position; they thought that by joining the assignor and the assignees as plaintiffs in one suit, that question would be evaded.

It so happened that they mistook the rules and practice of Courts of Equity, which, in order to meet questions of this sort, and in order to do justice to defendants, have established a very different rule. Two co-plaintiffs having inconsistent rights, cannot join in a suit. Some doubts have formerly been entertained about that, but it was established and settled in one of the most important causes that ever came for decision before a Court of Equity: I mean the case of *The Marquis of Cholmondeley v. Lord Clinton* (a). In that case one party claimed as devisee, and another party claimed as heir. Together they might say, and they did say, What is it to you, (the defendant), whether the property belongs to the devisee, or whether it belongs to the heir? It belongs to one or the other, and you ought to shew a preferable right to those who represent the interest vested in either one or other of those parties. But the Lord Chancellor said, —“No.

(a) See 2 Jac. & W. pp. 25, 124, where it is decided by Lord 55, and 135, where the point is *Redesdale* and Lord *Eldon*, raised; and 4 Bligh, pp. 81 and (Chancellor).

The defendant has a right to know by whom he is to be compelled to pay; and he has a right to avail himself of any infirmity in the title of the party suing him, and he has a right, therefore, to know whether he is to contest the question with the heir or with the devisee."

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Now, in this case, in point of principle, the position of the parties is precisely the same; for here are two parties, both of whom cannot be entitled. If the assignment be valid, the assignees are entitled; and if the assignment be invalid, then the party making the invalid assignment is entitled. There are two parties having interests which cannot co-exist—one of them must be entitled to the exclusion of the other; but both concur for the purpose of preventing the defendant setting up an infirmity in the title, either of the one or the other. In order to effect this purpose, the plaintiffs have necessarily run counter to an established rule, namely, that a party having no interest cannot join in a suit with a party who has an interest. If, therefore, what the plaintiffs allege be true, they have put a matter in issue as between the co-plaintiffs, and not between themselves and the defendant; and if it be true that this assignment is valid, then the difficulty is, that a party having no interest in the question cannot join, and there is a misjoinder, which certainly will cause a dismissal of the bill at the hearing, and which, whether taken advantage of at an earlier stage or not, may be taken advantage of at that time. Therefore, according to their own statement, the suit is open to the objection that the issue is an issue between the co-plaintiffs, and not between them and the defendants; and it is open to the other objection, that if what the bill alleges is true, and this is a valid assignment, then one party before the court cannot possibly take any interest in it, and she is, therefore, improperly brought before the court as co-plaintiff.

My Lords, the question between the parties was not

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disposed of altogether at the hearing, an issue having been offered, which the plaintiffs declined to take, the Lord Chancellor dismissed the bill, and very properly, if the issue had been a proper one; but if the issue was not a proper issue, then that refusal of it could not be a ground for the dismissal of the bill. But I have stated other grounds, which appear to me quite sufficient to justify that part of the decree which dismisses the bill, although not the ground appearing upon the record as that upon which the Court below proceeded.

The Lord Chancellor of *Ireland* decreed the dismissal of the bill, and reserved the interest of the party entitled under the intestacy, which is tantamount to a decision, that the religious house was not entitled to the money, on the grounds that the assignment was bad. It appears to me that in this suit, with these parties as co-plaintiffs, that was going beyond what a Court of Equity ought to do, because that question could not properly be decided in this suit. It appears to me, therefore, that although it is impossible for your Lordships to sanction this proceeding to the extent of pronouncing any decree which could possibly be operative against the defendant, your Lordships will do right to dismiss the bill, but without prejudice to any parties filing any other bill for the purpose of obtaining payment of that portion of the property to which the sister was originally entitled. The decree, therefore, which I should propose to your Lordships would be, to reverse the decree of the Lord Chancellor of *Ireland*, so far as it proposed to direct an issue, but to maintain that portion of the decree which dismissed the bill; and instead of reserving the right merely to the party originally entitled, to reserve the right generally to all the parties, to file any other bill for the purpose of obtaining payment of this money.

*Lord Brougham.*—I take entirely the same view, and did so throughout the hearing, as my noble and learned

friend. I think we are not called upon to enter upon the merits of the case in this proceeding, though I certainly have great doubt with regard to something that I have seen of the judgment of the Lord Chancellor upon the merits, respecting the compulsion said to be exercised over a party who is under the influence of a vow voluntarily taken to do something which another shall direct. That is a question which I wish to have no necessity of ever deciding, which, I think, is involved in very considerable doubt and difficulty, and which I am very happy, upon the present occasion, to think that we are not called upon to discuss or dispose of. But upon the ground taken by my noble and learned friend, there can be no doubt whatever that in this case there has been a miscarriage in the course adopted, of directing the issue between the co-plaintiffs; and I take it to be quite clear that advantage may be taken, at the hearing, of the other ground stated, that of the misjoinder.

At the same time that we give this judgment, reversing the decree offering the issue, as my noble and learned friend has justly added, there ought to be a proviso annexed to this judgment of reversal, to the effect that it shall be without prejudice to the right of these parties to institute another proceeding.

*Lord Campbell.*—I entirely agree with my noble and learned friends with reference to the manner in which this case should be disposed of. I shall most cautiously abstain from giving any opinion upon the important points which have been adverted to with respect to the merits of the case, as to the effect of a person entering into a religious house, now that the Roman Catholic religion is not the established religion of the state, but that certain toleration is granted to those religious houses. I likewise abstain from giving any opinion with respect to the merits of the transaction between the parties. But upon the

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ground which has been stated by my noble and learned friend, I have no hesitation at all in agreeing that this decree should be in part reversed. It is quite clear, both at law and in equity, if there be a party who has no interest in the suit, he cannot possibly be joined as a plaintiff. If you can join one who has no interest, you may join fifty. Then it is quite clear that, *quacunqve via data*, here is a party joined who has no interest. Although the assignor of a legal interest still has an interest, being trustee for the assignee, the assignor of an equitable interest has no interest whatever. It is quite clear therefore that there is a misjoinder; either the one party or the other has no interest; and consequently, upon that ground, an objection might have been taken in an early stage of this cause; and no doubt it may be taken in this stage, upon the principle laid down in the case to which my noble and learned friend has referred (*supra*, p. 718).

Mr. *Turner*.—The bill was dismissed with costs, to be paid by the assignees. I apprehend that the direction will now be to strike out that part of the decree, which directs the issue, and the declaration that the Court ought not to grant any relief upon deeds so obtained, and to dismiss the bill generally with costs, without prejudice to any bill to be filed by any of the parties; because the costs are thrown here upon the assignees, which would be necessarily implying that the assignment was wrong and fraudulent.

The *Lord Chancellor*.—We dismiss the bill on the ground of its having been improperly filed. All the plaintiffs are equally answerable for that, and therefore it must be dismissed with costs generally.

Mr. *Turner*.—Your Lordships strike out that part of the decree which directed the issue—

Sir *Fitzroy Kelly*.—Or rather which offered the issue ; it is not a direction.

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Mr. *Turner*.—Which offered the issue—your Lordships strike that out, and the declaration that “ the court ought not to grant relief upon deeds so obtained,” and dismiss the bill with costs generally, without prejudice to any parties to file a fresh bill.

Sir *Fitzroy Kelly*.—Exactly ; we shall have no difficulty upon that point ; your Lordships, I presume, give no direction as to the costs of the appeal.

The *Lord Chancellor*.—No.

[It was then ordered and adjudged that the decree be varied, by omitting the words, “ And the Court offering to direct an issue at law to try,” &c. (a), down to and including the words, “ founded on deeds so obtained ;” and also by omitting, after “ costs,” the words, “ to be paid by the plaintiffs, *Cecilia Fulham* and *Margaret Lynch* ;” and also the words, “ which the plaintiff, *Maria McCarthy*, or the defendant, *Catherine McCarthy*, may be advised to institute, as the next of kin of their father,” &c. ; and by substituting, in lieu of the last-mentioned words, the following, “ which any parties may be advised to institute in respect of the personal estate of the said *Alexander McCarthy*, in the pleadings mentioned ;” and it was further ordered that the cause be remitted back to the Court of Chancery in *Ireland*, &c.]

(a) *Vide, supra*, p. 706-7.

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 Mar. 4, 8, 9, JAMES FARMER - - - *Respondent*  
 13 and 15.  
 1848.  
 July 25. (Two Appeals.)

*Conveyances  
 impeached.  
 Fraud. Inca-  
 pacity. Undue  
 Influence.  
 Acquiescence.  
 Pleading.  
 Parties.*

A BILL by *A. F.*, as heiress at law of *J. J.* and *E. J.*, to set aside conveyances made by them to *W. F.*, of real and personal estates, on the ground of fraud, undue influence, and want of consideration, alleged that *J. J.*—who was deaf and dumb at his life—was incapable of executing or understanding any deed, and that *E. J.* was seduced by *W. F.*, and being subject to his authority, executed the deeds without professional advice, and for insufficient consideration, consisting only of a bond of *W. F.* for securing the price. There was not sufficient evidence of *J. J.*'s incapacity, nor did the deeds executed by him convey any property descendible to his heirs. The allegations of the seduction of *E. J.*, and of improper influence over her, were not sustained by the evidence, although there was some evidence of an illicit connexion between her and *W. F.* It appeared also that *A. F.* had the benefit of the bond given to *E. J.*, and had long acquiesced in and admitted the validity of the transactions:

Held, that the bill was properly dismissed for want of sufficient proof of the charges as alleged, so as to justify the Court in setting aside concluded transactions.

Held also, that the want of parties to represent the personal estates comprised in the impeached conveyances, was a fatal defect.

Seemingly, that by an appointment duly made of a whole estate to the uses of a marriage settlement by a party thereto, who thereby also granted and released a moiety only of the estate to the same uses, the entirety of the estate passed.

THESE appeals were brought against two decrees made by the Vice Chancellor of *England* in two causes.

The appellant was the widow of *William Farmer*, the sole surviving child and heiress-at-law of *John Jones*, and also heiress at law of *Elizabeth Jones*. The object of the appellant's suit was to set aside conveyances ex-

cuted by *John* and *Elizabeth Jones* to *W. Farmer*, on the grounds of incapacity, fraud, undue influence, and inadequate considerations. The respondent was the brother of *W. Farmer*, and heir at law of his only child, *Fanny Farmer*. The bill, in the second cause, was filed by him to establish the said conveyances, and for partition.

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*John Jones's* father, who died in 1795, devised his real estate, consisting of a farm-house and lands, called "the *Hill Farm*," in the parish of *Suckley*, in the county of *Worcester*, to trustees, charged with an annuity of 80*l.*, for his said son for life, and subject thereto to the use of *Ann Jones*, the testator's wife, for her life, with remainders over; but he authorized his wife, in case the son should marry in her lifetime, and she should be of opinion that he was capable of taking the management of the testator's real and personal estate into his own hands, to appoint the same to him absolutely, or in such manner as she should think proper, and thereupon the remainders over should cease.

In the year 1800, *J. Jones*, being then forty-three years of age, was, with the approbation of his mother, married to *Frances Ewens*, and by a settlement made before the marriage, by the mother and son and the said *Frances*, of the first, second, and third parts respectively, and by *Thomas Jones* and *Edward Archer*, of the fourth part, the *Hill Farm* estate was limited to the use of *J. Jones*, for life, subject to his mother's life interest, with remainder, in the events that happened, to the use of the said *Frances*, the wife, for her life, with remainder on failure of sons of the marriage, which happened, to the use of all the daughters in fee, in equal shares.

The settlement recited that *J. Jones*, party thereto, was deaf and dumb from his birth, but was of sound reason, and readily communicated his meaning by writing and gestures; and that *Ann Jones*, his mother, was of opinion



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that he was capable of taking the management of the estate. By a memorandum annexed to the settlement, signed by *John Jones*, he certified that the same had been explained to him by his mother and wife, and that he understood its effect.

The only issue of the marriage was the appellant and *Elizabeth Jones*.

*Ann Jones* died in 1809, having devised certain freehold and leasehold property (not in question in the appeals) to the appellant, and also bequeathed to her and her sister, the said *Elizabeth*, 1,000*l.* due on mortgage, with directions for accumulation of the interest, until both should attain the age of twenty-one years, the principal and interest to be then divided equally between them; and she gave the residue of her estate to *J. Jones*, and appointed him and his wife, and the said *Thomas Jones* and *Edward Archer* trustees and executors of her will, which was soon afterwards proved by *Thomas Jones* and *E. Archer* alone.

*Frances*, the wife of *J. Jones*, died in 1816, and *Thomas Jones*, the trustee, died in 1817.

The appellant was married in 1820 to *William Farmer*, and by a settlement then made, her father appointed the entirety, and granted and released a moiety (a) of a small estate, called "*Bill's Lands*"—which he had purchased in 1813, and was conveyed to him to such uses as he should appoint, &c., with a limitation to a trustee, &c., in the then usual form of conveyances, to her dower—to himself for life, remainder to *W. Farmer* for life, remainder to the appellant for her life, if she survived her husband, remainder to the use of the children of the marriage as tenants in common in tail, and if but one child, to the use of that child in tail; with remainder, as to one moiety, to the use of *W. Farmer* in fee; and as to the other moiety, to the use of the appellant and her right heirs.

(a) For the construction of this deed, *vide post*, pp. 731, 734, & 749.

This settlement contained a covenant by *W. Farmer*, that he and the appellant, after she should attain her age of 21 years, would levy a fine of or otherwise assure the moiety of the *Hill Farm*, to which she was entitled under her father's marriage settlement, subject to his life estate, to the same uses as were by this settlement declared concerning the moiety of *Bill's Lands*. [A deed was executed by them in 1827, in pursuance of that covenant.]

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Annexed to the settlement was a memorandum, signed by *J. Jones*, that the same had been explained to him.

The property of *J. Jones*, after the death of his wife, in 1816, was managed under the advice and superintendence of *Edward Archer*, and on his recommendation, a lease for fourteen years of the *Hill Farm*, including *Bill's Lands*, which adjoined the farm, was made to *W. Farmer* upon his marriage with the appellant, at a rent of 250*l.* The farming stock, implements of husbandry, furniture, and other effects, were taken by him at the same time, at a valuation, for 1,200*l.*, for payment of which, with interest at five per cent., he gave his note, payable to *Edward Archer*, then sole surviving trustee of *J. Jones's* marriage settlement, executor of *Ann Jones's* will, and trustee with a *Mr. Parker*, of the appellant's marriage settlement, and also trustee for *John Jones* in an agreement in the said lease, whereby it was provided, that during the term thereby granted, *W. Farmer* should furnish him with board and lodging in the farm-house, for 50*l.* a-year.

From that time *Jones Jones*, and his daughter *Elizabeth*,—except while at school,—resided with *W. Farmer* and the appellant.

*Edward Archer*, having died intestate, in 1824, *Richard Yapp*, his nephew, obtained letters of administration of his estate, and was elected to succeed him in the above-mentioned trusts for *J. Jones*, and *Elizabeth*, and the appellant.

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By indentures of lease, and release and assignment, the 28th and 29th of *September* 1827 respectively, *Jones* conveyed his life estate in the entirety of the *Farm* and *Bill's Lands*, and also his supposed moiety of the reversion in fee in *Bill's Lands*, expectant on his own death, to *W. Farmer*; and he assigned to *W. Farmer* all his personal estate—which included the said not less than 1,200*l.* with the interest thereon for four years, and four years' rent of 250*l.* The consideration for this conveyance and assignment was a bond given by *W. Farmer* to *J. Jones* during his life, to secure payment of 50*l.* a-year to *J. Jones* during his life. This was one of the deeds impeached by the appellant.

By indentures of lease and release of the same date, impeached, *Elizabeth Jones*, who had then attained the age of twenty-one, in consideration of 2,800*l.*, conveyed to *W. Farmer*, his heirs and assigns, her moiety of *Hill Farm*, in remainder expectant on her father's death, to which she was entitled under his marriage settlement. By a bond of even date, reciting that it was agreed that the 2,800*l.* should remain in the hands of *W. Farmer* until the interest, and that he was indebted to *Elizabeth Jones* on an account stated, in the further sum of 2,200*l.*, making together, 5,000*l.*, *W. Farmer* bound himself in the sum of 10,000*l.*, to secure 5,000*l.* with interest, to *Richard Yapp* in trust for her, which trust *Yapp* afterwards declared to be in the events that happened, subject to her appointment.

*Elizabeth Jones* having fallen into bad health, without hope of recovery, in 1828, appointed the 5,000*l.* to *Richard Yapp*, appellant, and died in *August* of the same year.

*W. Farmer* claimed by his marital right to be entitled to the sum so appointed, and he demanded his bond to be released, which *Yapp* gave, after getting an indemnity from *W. Farmer*.

*William Farmer* died intestate in 1833, leaving as appellant, his widow, who took possession of all his personal property, real and personal, and one child of their marriage.

*Fanny Farmer*, then an infant, his heiress-at-law, who soon afterwards filed a bill by the respondent, her uncle and next friend, against the appellant, administratrix of *W. Farmer*, for an account of his estate. The appellant in her answer admitted her daughter's title, as heiress-at-law of her father, to the fee simple in possession of one moiety of the *Hill Farm*, and one moiety of *Bill's Lands*, and to an estate during the life of *J. Jones* in the other moiety of *Bill's Lands*, under the conveyances executed by him and *Elizabeth Jones*, in *September 1827*.

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*John Jones* died in 1836, leaving the appellant his heiress-at-law. And *Fanny Farmer* died in 1839, under age, unmarried, and intestate, leaving the respondent her heir-at-law.

The appellant filed her bill in 1840—amended in 1842—against the respondent, and therein stated, among other things before stated, that in 1827 *John Jones* was much afflicted, being both deaf and dumb, only capable of communicating by signs, unable to read or write unless some one guided his hand, and incapable, from age and weakness of body and mind, of transacting any business, or understanding the effect of deeds: that his property was managed for him by his mother till her death, afterwards by his wife and the trustees of their marriage settlement, until the wife's death, after which, *Edward Archer* assumed the entire control and direction of him and his affairs, until, in consequence of the arrangement made by *Archer* with *W. Farmer*, *J. Jones* and his daughter *Elizabeth*, went to reside with him, and thereby he obtained complete power over both, taking advantage of the imbecility of the former, and of the age and position of the latter: that he first seduced her for the purpose of effecting his designs on her property, and she being with child by him, in *September 1827*, became consequently subject to his authority and influence, and in that state she executed the deeds before stated, which the bill

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charged to have been prepared by *W. Farmer's* solicitor from his own instructions, and executed by her without professional advice; and that by those means *W. Farmer* obtained possession of all the freehold estates and other property of *John* and *Elizabeth Jones*, without advancing any money, but merely securing by his bonds, and other securities which were grossly inadequate considerations for the property conveyed. The bill further stated that the appellant did not impeach the said deeds as fraudulent in her answer to the bill filed against her by *Fanny Farmer* because she was desirous to conceal from her the conduct of her father, and she submitted that her silence and bearing in that respect ought not to preclude her, after her daughter's death, from setting them aside as fraudulent.

The bill prayed that the said deeds so executed before mentioned by *John* and *Elizabeth Jones* might be declared fraudulent and void, and that the respondent might be decreed to convey the moieties of *Bill's Lane* and the *Hill Farm* to the appellant, as heiress-at-law of *John* and *Elizabeth Jones*, and might be restrained by injunction from bringing actions against the appellant for recovering the deeds in her possession, or for recovering possession of the said several moieties of the estates.

The respondent in his answer said the deeds in question constituted a family arrangement, first proposed by *John Jones* himself, for the purpose of freeing him from care, and of disposing of his property in his lifetime as he would by his will, to make provision for *W. Farmer* and the appellant and his other daughter: that although he was deaf and dumb all his life, he was notwithstanding of sound reason, and readily communicated his meaning by writing and gestures: that he was (in 1827) about the age of sixty-eight years, and was a hearty and vigorous, and much more capable of trans-

ing business than men of his age and similarly afflicted usually are ; nevertheless that attention to business was irksome to him, and he desired to be released therefrom by his said son-in-law, in whom he reposed confidence : that his property, at the time of executing the deed of *September 1827*, consisted only of his life estate in possession in the *Hill Farm* and in *Bill's Lands*, both being of the annual value of 250*l.* ; and he had no estate in fee in a moiety or in any share of the latter estate, the entirety of that estate having passed by the appointment to the uses of the appellant's marriage settlement of 1820 : that his personal estate consisted of the farming stock, &c., valued at 1200*l.* The respondent denied that *W. Farmer* prevailed on *J. Jones* or *Elizabeth* by any deception, undue influence, or any improper means, to execute the said deeds, but the same were executed in pursuance of the family arrangement previously agreed to by them and *W. Farmer* and the appellant : that *J. Jones*, considering the 50*l.* secured to himself during his life sufficient for his general purposes, and being desirous to provide a fortune of 5000*l.* for his daughter *Elizabeth*, it was arranged that *W. Farmer* should secure that sum to her by bond, in consideration of her conveyance to him of her moiety in reversion of the *Hill Farm*, valued at 2800*l.*, and of a sum of 2200*l.* due from *W. Farmer*, not to her, as the bond erroneously recited, but to *J. Jones*, for the farming stock and rent : that the respondent did not necessarily claim any interest in *Bill's Lands* under the deeds of 1827, having been advised that the appointment thereof by *J. Jones* in the marriage settlement of 1820 operated to pass the entirety of that estate to the uses of the settlement, although a moiety only purported to be thereby granted and released ; but that if a moiety in fee remained vested in *J. Jones*, the same was effectually conveyed by the deed of 1827 to *W. Farmer*, and descended to the respondent as heir-at-

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law of his daughter and heiress-at-law. The respondent denied that *W. Farmer* was an immoral man, and he seduced *Elizabeth Jones*, or was the father of her illegitimate child.

A cross bill was filed by the respondent against the appellant, praying that the deed of *September 1827* executed by *Elizabeth Jones*, and, if necessary, the deed of the same date executed by *John Jones*, might be annulled; and that an account might be taken of the rents and profits of the *Hill Farm* and *Bill's Lands* received by the appellant since the death of *Fanny Farmer*, and that a receiver might be appointed, and partition made of the *Hill Farm* between the appellant and respondent.

The appellant in her answer put her defence on the same grounds on which, in her bill, she impeached the said deeds.

A great number of witnesses (eighty-nine altogether) were examined on both sides in the first cause; and an order was made that their depositions might be read in both causes at the hearing. The examination of the witnesses was directed to the competency of *J. Jones* in his business, and to the conduct of *W. Farmer* towards *Elizabeth Jones*. The material parts of the evidence on these points are stated in the Vice Chancellor's judgment.

The causes were heard by his Honour in *January 1844*, and by the decree made in the first cause the appellant's bill was dismissed, with costs (a). E

(a) The following are extracts from a short-hand writer's report of the judgment, admitted by the counsel on both sides, to be correct:—

*The Vice-Chancellor.*—Upon the marriage of *J. Jones*, a settlement was made, whereby, in the events that happened, the daughters of the marriage, *Ann* and *Elizabeth*, became entitled to the lands in common in fee, in equal shares to the "*Hill Farm*" estate. In the year 1813, *J. Jones* purchased an estate called

decree made in the cross cause, it was declared that the respondent was entitled, under the conveyance by *Elizabeth Jones* to *W. Farmer*, to the fee simple

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*Lands*," which was conveyed in the common manner, with a trustee to bar dower, but giving him the general power of appointment, which is found in such conveyances. Upon the marriage of *Ann* with *W. Farmer* in 1820, a settlement was made, comprising her moiety in reversion in fee in the *Hill Farm*; also comprising *Bill's Lands*; and it was supposed by the parties, that the effect of it was to settle a moiety of *Bill's Lands* to the uses of the settlement, and to leave the other moiety vested in *J. Jones*, just as he had taken it by the conveyance of 1813.

*Elizabeth Jones* attained the age of twenty-one in 1827, and several conveyances were then executed; and, amongst others—besides a conveyance for giving effect to the settlement of 1820, which, as far as *Ann* was concerned, could only operate as articles upon her estate—there was a conveyance made by *J. Jones* to *W. Farmer*, of such estate in the *Hill Farm* and in *Bill's Lands* as it was supposed *J. Jones* had by virtue of his own marriage settlement and of the marriage settlement of his daughter *Ann*; and there was also a conveyance made to *W. Farmer* by *Elizabeth Jones*, of her moiety of the *Hill Farm*. Part of the consideration which she was to receive for the estate, as appears upon the face of the conveyance, was a sum, for which, together with another sum, a bond was given by *W. Farmer*, and which bond, having been given to *Mr. Yapp*, was declared, by a declaration of trust, to be held by him, in effect, according to the appointment of *Elizabeth Jones*, and she, in *July* 1828, made an appointment of her interest in the bond after her death, to her sister *Ann*, and died in the *August* following. *W. Farmer* died in 1833, and *J. Jones* in 1836. There were two children of the marriage of *Ann*, a son, who died in 1831, and a daughter, *Frances*, who survived the father. In 1833, soon after the death of *W. Farmer*, an infant's bill was filed by *Frances* against her mother, the present plaintiff; and she put in her answer in *November* in that year. *Frances* died in 1839.

The present bill was filed in 1840, by *Ann Farmer* against the defendant, who is the brother and heir-at-law, in the events that have happened, of *W. Farmer*, for the purpose of setting aside the conveyances of *September* 1827, executed by *J. Jones*, and by



and then that there may be reconveyances or other relief. The bill is framed upon the allegation that the conveyances were obtained by fraud ; and there is no evidence of circumstances, in order to make out the case with respect to *J. Jones*, it is alleged that he was bound and there are several allegations to shew that he did not understand what he was doing, and that he was oppressed in a tyrannical manner by *W. Farmer* ; and that *W. Farmer* committed various acts of cruelty over *Elizabeth Jones* and over both *John* and *Elizabeth Jones* completely in his power—having them in his power—that is the substance of the bill, not that there was any direct evidence of fraudulent representations, but that he, having power—procured them to execute the conveyances.

Now, with respect to the conveyance by *J. Jones*, it is said to be a life estate, which he could part with, only by his death ; and, therefore, unless he had any estate which would pass by the conveyances then made, of course there could be no relief as to him ; and upon hearing, that a very material question arises upon how far—looking at it both as an execution of the will of *F. Jones* had over *Bill's Lands*, and as a conveyance with effect of leaving in him any estate at all in his power, I have read it over most attentively, and it does not appear that the true construction of that deed, is this—first, with a limitation and appointment to uses of the *Lands*, followed by a conveyance, a grant of the moiety of *Bill's Lands* to uses ; and then, with reference. uses are declared. the effect of which

ordered that the appellant should pay the costs up to the hearing, and that a receiver be appointed over the *Hill Farm*, including *Bill's Lands*, and that he should receive

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took its effect, as I think it did, according to the appointment, the result is, that *J. Jones* had nothing to convey except his life estate; and that upon his death, the fee simple being wholly vested in one moiety in *W. Farmer*, has passed to *James Farmer*, and that the conveyance of 1827 operated nothing as to that supposed moiety of *Bill's Lands*; and, therefore, whether there was fraud or not exercised in the procurement of the conveyance from *J. Jones*, it appears to me, that of necessity there can be no relief as to what it was supposed that *J. Jones* conveyed by the indentures of 1827, and the bill must be dismissed with costs.

But the story that is told by the bill respecting *Elizabeth Jones*, mixes itself in a great degree with the story about *J. Jones*; and when I say the bill, I mean to include also the evidence given by the plaintiff, which is most distinct and minute with respect to a vast number of facts, which are not put in issue by the bill. The consequence is, that observations which apply to that part of the case in which *J. Jones* alone is named, have considerable weight upon the part which relates to *Elizabeth Jones*; and it is a most striking thing that this case should have been put upon a fraud exercised by *W. Farmer* upon *J. Jones*, in respect of his utter incapacity, when it is plain, that when *J. Jones* married, a settlement was made by his mother, by virtue of a power which she had under her husband's will, which settlement, on the face of it, proceeded on the footing that her son was competent to contract the marriage, and to manage his own affairs. The recital, which is introduced, and which is made to tally with the words in the will of the father, must have been utterly false, and the whole thing a fraud, unless it was taken to be, as we must suppose it would have been in the eye of the mother, a reasonable and fit thing that her son should marry, and that she should make the settlement. If he was so utterly incapable as the bill represents, how happened it, not only that he purchased *Bill's Lands*, but that he made a settlement of them upon the marriage of the present complainant.

There was another transaction with respect to the sale of

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from the tenants the rents from *April* 1835, when *Farmer* died, and pay the same to the appellan

*J. Jones's* farming stock and effects, the benefit of which, pears, passed to *W. Farmer*, who died intestate, whereup plaintiff, his administratrix, had the benefit of that trans and therefore with respect to matters of such great import marriage, as purchase, as settlement, as sale of proper those things are admitted to be valid, and yet the plainti so admits and takes benefits under them, now states on t of her bill that this *J. Jones*, her father, was all along inc of taking ordinary care of himself in the common affairs. Now, these general observations greatly affect the case pre by the bill and by the evidence, before you come to consid ticular parts of it, and naturally induce a reluctance to that the things can be true, which are specifically stated f purpose of supporting the general allegations; for you ha general facts, which quite contradict the general allegation

With respect to *Elizabeth Jones*, there is a vast deal of in this bill; but it really comes to this, that *W. Farmer* s her, was the father of her illegitimate child, born in *May* and at the same time treated her with great cruelty; and f force, in effect, she was compelled to execute the conve which are complained of. Now I have read every word evidence given by all the witnesses, both in chief and upon examination; and the evidence, if you believe some of t nesses, would establish the fact of an incestuous intercourse there is not one word of it that proves seduction, and sed is the thing that is stated, because illicit concubinage ma place without seduction; and it is remarkable that one witnesses, a *Mrs. Robertson*, who is brought forward to the fact of seduction, if she proves anything, proves a which evidence, I must also observe is not admissible as the defendant, because the witness is only stating what *El Jones* stated to her. What *Elizabeth Jones* stated to her evidence against the defendant, but may be evidence fo and, according to this witness's representation, it is eviden force was used against *Elizabeth Jones*, but not that al seduced. I do not think it necessary to comment on t dence that is given of the illicit concubinage; but I must c

respondent in such proportions as the Master should find they were entitled.

The appeals were against these decrees.

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that there is a great deal of evidence in favour of the general character for uprightness which *W. Farmer* possessed, and, in a case where so grave a charge is made, weight ought to be given to the character which a party is proved to have had, independently of the general presumption which the law would make that a party standing in the situation of *W. Farmer*, is not to be suspected, without strong proof of such circumstances as are alleged against him.

[His Honour then stated and contrasted the depositions of several witnesses who were examined with reference to the paternity of *Elizabeth Jones's* child, and came to the conclusion that the allegation in the plaintiff's bill that *W. Farmer* was the father was not proved, and therefore her case failed on that point also. His Honour proceeded.]

With respect to the other branch of the plaintiff's case, that the conveyance by *Elizabeth Jones* was the result of fraud and intimidation, there is no evidence directly of it, none whatever; but there is the evidence of *Mary Jones*, a witness for the plaintiff, that *Elizabeth Jones* told her, speaking of the conveyance, "I have done it in the hope that it will make him kinder to myself and Ann." That is not evidence of fraud or force, but of a spontaneous act, done by herself, for the purpose of procuring greater kindness. But with respect to the mode in which the thing was done, there is a witness altogether not only unexceptionable, but in a remarkable degree credible, from the degree of bad character which he has given to *W. Farmer*; I mean Mr. *Yapp*, who, in his answer to the fourth interrogatory, says, "I am unable of my own knowledge to depose, but I have heard and am rather disposed to believe that *William Farmer* was of a cruel and sanguinary and selfish disposition." Now, who was Mr. *Yapp*? He was the personal representative of Mr. *Archer*, who had been the surviving executor of the will of the grandmother, and Mr. *Yapp* was introduced in his place as a trustee in the plaintiff's marriage settlement, and was the confidential friend of the family; and it appears distinctly from his evidence that he was the principal person who

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Mr. *Turner* and Mr. *Bacon* for the appellant :

Two decrees have been made in a cause and cross-cause, a thing quite unusual, and the appellant has been

regulated the transactions that took place between *Elizabeth Jones* and *W. Farmer*. He appears to have made a minute calculation as to what was the sum proper to be paid ; he took into consideration accounts for a considerable period of time ; he determined in his own mind that such a sum—I think originally it was 2900*l.*, and there is a particular explanation given afterwards why it was reduced to 2800*l.*—should be taken as the price of *Elizabeth Jones's* reversion in the moiety of *Hill Farm* ; he took into consideration what was due upon a promissory note, which had been given to her by *W. Farmer* and himself, making a very minute calculation ; he comes to the conclusion that the transaction should proceed on this footing—that *W. Farmer* should give a bond to secure 5000*l.* Some acute observations about an error in the account were made in the course of the argument ; there may have been error, the thing is not impeached on the ground of error, but on the ground of fraud ; and, therefore, supposing there was an error, that, of itself, is no reason for upsetting the transaction.

But it appears, with respect to the error, a lease had been granted of *Hill Farm* to *W. Farmer* for £250 a year ; that being taken to have been a fair rent, at thirty years' purchase, it would have been £7,500, and the moiety of that would have been £3,750. I am speaking of the whole estate in possession, at thirty years' purchase, and supposing you had then said that the £2,800 or £2,900 should have been taken as the value of the reversion of a moiety, is there anything so grossly unfair in that, on the face of it ? It really does appear to me, that supposing the fullest value was not extracted, yet Mr. *Yapp*, the friend of the family, interposing between *W. Farmer* and *Elizabeth Jones*, obviously not having any great respect for the character of *W. Farmer*, but thinking enough about him to see the importance of acting fairly towards *Elizabeth Jones*, takes the trouble to go through the whole matter, and to fix a price in the way I have mentioned.

This part of the case is also made to rest upon this, that the conveyances were not properly read over and explained. That surmise on the part of the plaintiff is abundantly refuted by the evidence that

forced to bring two appeals. Both causes relate to the same properties, consisting of two estates called "*Hill Farm*, and "*Bill's Lands*." The bill filed by the appel-

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has been given, both by Mr. *Parker* and by *Dooley*. So that here we have got a case in which it is proved, as a matter of fact, that pains were taken by a disinterested person, with a full knowledge of the character of the parties, in order that that might be done which was fair, and the conveyances were executed, not in a hurry, but after full explanation.

[His Honour then, with respect to other allegations in the appellant's bill, referred to the depositions of several of her own witnesses, shewing that some of the deeds complained of, especially the appointment by *Elisabeth Jones* of the 5000*l.* secured by the bond, were executed in her presence, with her apparent approbation; that she and *W. Farmer* were always on the most affectionate terms; that she used to speak of him as the best of husbands; and that *J. Jones* also appeared to regard *W. Farmer* with respect and affection, and cried for him upon his death.] His Honour added, My opinion is, that upon the substance of the case, the case of fraud as against *J. Jones* and against *Elisabeth Jones* is distinctly disproved; not only not proved by the plaintiff, but disproved by the defendant.

Then there is, last of all, this observation to be made, that *Ann Farmer* files her bill in the year 1840, complaining of all these transactions. She does not pretend to have been ignorant of them at the time of her husband's death, but she represents, that she did not like, as against her daughter, to bring them forward, and the consequence, therefore, is, that in that suit, of the infant *Frances Farmer* against the present plaintiff, she herself represented that her daughter was entitled to that very estate by descent from *W. Farmer*, which she now seeks to set aside, because it was not the estate of *W. Farmer*. Now this is the proceeding of *Ann Farmer*, that, being contented, during the lifetime of her daughter, to say nothing about these transactions, and not taking that very wise and sensible advice which Mr. *Yapp*, in his answer to the 48th interrogatory, says he gave her, "that it was not to her interest to prosecute this suit, and that it had better be compromised," she did not choose to follow that advice; nor to consider that it might not be to her interest to prosecute the

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lant, which is the subject of the first decree, dismissing that bill, impeached deeds of conveyance executed by *John Jones* and *Elizabeth*, his daughter, on the ground of incapacity of the former to understand what he made to do, and of undue influence and coercion in obtaining the execution of the deeds from the latter for want of sufficient consideration, which is applicable to both.

It was sufficiently proved in the first cause that

suit; and still less did she choose to consider that it might be for her character; because, here you have a woman, in the year 1840, with a deliberate knowledge of these transactions, it appears upon her own evidence, which, if they ever existed, she must have had, stating as part of her case, that her husband was of so gross and bad a character, that not only did he engage in an incestuous and adulterous intercourse with her own mother, but ill-treated her and the plaintiff, and, moreover, made an attempt actually to take away the life of her father. Though the witnesses have given evidence of that attempt to strangle him, it is remarkable that even there the story is not confirmed, because upon pursuing the thing, from beginning to end, you find that other witnesses give a different version of the transaction, and represent that old *Jones* used to run away, from the house to hide himself, and that so far from an intention to strangle him in the tool-house, the object was to get him out by means of suffocation; and therefore the case is not so bad as some of the plaintiff's witnesses would have represented. But never for the sake of subverting transactions which took place, it appears to me, in the fairest manner, the plaintiff has destroyed her own character, by coming forward and stating these most horrid circumstances against her husband, for the character she was bound to protect.

I cannot but think the advice of Mr. *Yapp* was the best, which she did not choose to follow; but, having thought proper to bring this bill, my opinion is that it has failed in all its parts, and both as to the relief asked with respect to the conveyance by *Elizabeth Jones*, as well as the conveyance by *John Jones*, the bill must be dismissed with costs.

*Jones* was not, at the time the deeds of *September 1827* were executed, competent to understand the nature of those deeds, or to consent to any proposal or arrangement such as the respondent alleges.

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It was pressed in the argument before the Vice Chancellor—and his Honour was also of opinion—that by the appointment of *John Jones* in the appellant's marriage settlement in 1820, the entirety of *Bill's Lands* passed to the uses of the settlement, and that, therefore, he had nothing but his life interest in that estate to convey by the deed of *September 1827*. But the grant and release in the indenture of 1820, and the subsequent limitations therein of *Bill's Lands*, are expressly confined to a moiety; and that must have been the intention of the parties, there being the two daughters, each was to have a moiety of this estate, as each had of the *Hill Farm*—

[The *Lord Chancellor*.—The two parts of the indenture are inconsistent; one part conveys the whole estate, while the other part grants and releases a moiety. Whether that was an error or not, we cannot say. The bill does not ask to correct an error, but proceeds on the ground that the plaintiff is heir-at-law of *John Jones*. But if he conveyed all his interest to the uses of the settlement of 1820, there was nothing for the heir, and there is an end of the plaintiff's case as to *J. Jones*.]

If any doubt exists on the construction of the settlement, a case ought to be sent to a court of law for the legal construction of it.

But even on the supposition that *John Jones* had only his life estate to convey by the deed of *September 1827*, surely for that interest—for which *W. Farmer* was then paying 250*l.* a-year—and for his whole personal property an annuity of 50*l.* secured to him for his life by *Farmer's* bond, was a grossly inadequate consideration. The personal estate included four years' rent—equal to 1,000*l.*—and the same rent for his life might be estimated at 1,000*l.*



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more at least, to which two sums, if the debt of 1,200 for which, with interest, *W. Farmer* passed his note being the value of the farming stock and furniture added, there would be a round sum of 3,200*l.* The consideration for the whole property was board and lodging *J. Jones*, and 50*l.* a-year—for half of which, it must be borne in mind, *Elizabeth Jones* passed her bond to *Farmer*. Could any man of a particle of common sense deal with his property in that manner? Was any evidence necessary to demonstrate *J. Jones's* incapacity for business? He never was considered capable of transacting any business. The recitals to the contrary in the marriage settlement were introduced as of course from the father's will—which in effect declared him incapable—his property was always managed by others, first by his father, then by his wife, after whose death, Mr. *Archer* took the management of it, not for *J. Jones* merely, but for the daughters as well, until having brought about the marriage of the appellant with *W. Farmer*, his nephew, he transferred to him the management of the property, and of the affairs of *J. Jones*. It was then that the alleged family arrangement was planned by the grant of the lease of the estates to *W. Farmer*, after which, both *John* and *Elizabeth Jones* became resident in his house, entirely dependent on him, and subject to his authority and influence.

Not content with getting all *J. Jones's* property out of payment of one farthing, *W. Farmer* also contrived to obtain all the property, real and personal, to which *Elizabeth Jones* was, or would become, entitled, for a sum of 5,000*l.*, secured by his own bond. Her moiety of *Hill Farm*, in fee, was worth at least three-fourths of the sum. Jointly with the appellant, she would be entitled to the fee simple of the moiety of *Bill's Lands* on the death of their father, if the entirety of that estate did not pass by his appointment in the settlement of 1820, and if he were incapable—as he clearly was—of making a will, devi-

it away from them. But besides these freeholds, *Elizabeth Jones* was, under the will of her grandmother, entitled to a moiety of a legacy of 1,000*l.*, with its accumulations since 1809, and to other personal property. She was made to convey and assign the whole of her property for a nominal consideration, in ignorance of her rights, without professional advice, and under the influence of *W. Farmer*. How he gained that influence is matter of controversy, but the preponderance of the evidence is, that he seduced her before she attained twenty; at all events, had illicit connexion with her, which must be assumed to be the result of seduction, although seduction is not proved. The result of that connexion was this—she became pregnant just at the date of these deeds, and being in that situation, she was unable to resist his designs on her property.

She had an illegitimate child soon after the execution of these deeds; and one would suppose, very naturally, that when on her death-bed, she would appoint to that child the 5,000*l.* secured by *Farmer's* bond, but his influence still prevailing, she made the appointment in favor of the appellant, not excluding his marital right, and, therefore it was an appointment in effect to him. Accordingly, immediately after *Elizabeth Jones's* death, he exercised his right, and Mr. *Yapp*, the obligee and trustee in the bond, gave it up to be cancelled. Was not this proof of undue influence as charged in the bill? But *W. Farmer* was not content with the conveyances, thus obtained without consideration, of the moiety of *Bill's Lands* from *J. Jones*, and the moiety of the *Hill Farm* from *Elizabeth*, but in further prosecution of his designs, he induced the appellant at the same time, to execute a deed with him, whereby, instead of settling her moiety of the *Hill Farm* to the uses limited in her marriage settlement of the moiety of *Bill's Lands*, in pursuance of their covenant in that settlement, it was so settled that she was not to exercise her

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power of appointment until after his death, which is a clear departure from the purpose of the settlement.

It is the duty of the respondent, claiming title to property under deeds of so suspicious a character, to shew that they were fairly obtained. There was no attempt made to shew that *J. Jones*, or even *Elizabeth*, was capable of understanding the deeds of 1827, or that either of them had professed advice, or the benefit of a valuation of the property were severally made to convey. It appeared to the Chancellor that Mr. *Yapp* entered into some calculation of the value of *Elizabeth Jones's* property, but of his conduct, indeed, of the whole of the evidence, his Honour took a one-sided and an erroneous view. All the transactions were more or less connected with the respondent and the proper course at the hearing of the cause would have been, instead of dismissing the appellant's bill, to direct an issue or action, in which the witnesses might be subjected to a *vivâ voce* examination and cross-examination—

[The *Lord Chancellor*.—What form of issue would you have ?]

An issue to try whether the deeds were obtained by fraud.

[The *Lord Chancellor*.—That is an issue to try a question of equitable construction.

*Lord Brougham*.—If the jury found that there was no due execution of the deeds, there would still be a possibility of equity reserved. If parties knew how these issues were tried, they would never incur the expence.]

Probably an inquiry before a Master in Chancery in this case, be more satisfactory, especially as to the accounts of the rents and the interest.

The second appeal depends on the decision of the first. If the first decree be affirmed, the second decree is of course ; but, if the first be reversed, as it might be, it ought to be, and further proceedings di-

then the second decree must be suspended until the appellant's suit shall be brought to a termination.

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Mr. *Bethell* and Mr. *Bird* for the respondent:

There never was a case presented to the House with less reasonable cause of appeal than this. There is no ground whatever for the frightful and scandalous accusations contained in the appellant's printed cases. It is impossible not to be disgusted with the charges she brings against her deceased husband.

First, as to *J. Jones*, the appellant's bill states, and it is part of her case, that he contracted a valid marriage in 1800, made a valid purchase of *Bill's Lands* in 1813, and did other equally valid acts previously and subsequently, the admission of all which might well relieve one from producing other evidence of his competency to transact business. Her own marriage, while she was under age, and the settlement made thereon, derived validity from her father's consent to the former, and being a party to the latter. The provisions in that settlement in favour of the appellant, and the recitals in it, and in the settlement made on the marriage of *J. Jones*, ought to preclude the appellant from questioning his competency; yet those deeds are equally as liable to be impeached as the deeds executed by *J. Jones* in 1827. They, as well as the two marriage settlements, were prepared by Mr. *Parker*, who was the solicitor and professional adviser of the *Jones* family for forty-five years, and never knew or heard of *W. Farmer* till his marriage with the appellant. He was examined as a witness in this cause, and he proves the execution of the deeds in 1827, by *J. Jones*, and proves his competency at the same time. All the deeds came out of the appellant's own custody, and she derived benefits under them, as it was intended she should. All these deeds were intended by the parties as a family arrangement, by which *J. Jones*, having but two daughters, disposed of all his property be-

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tween them as he would by his will. Who could be selected to carry this arrangement into effect for their benefit so proper as the husband of one of them? All the evidence on the part of the respondent proves the arrangement effected by the deeds to have been, under the circumstances, reasonable and proper on the part of *Elizabeth* as well as *J. Jones*; that they were both competent to form a judgment, and did, in fact, form a judgment, and approved of the deeds by which the arrangement was effected, under the advice of competent professional and other advisers, and free from all control and improper influence.

There was not a particle of evidence in the large mass of depositions in this case to prove the exercise of any improper influence or authority or coercion over either *John* or *Elizabeth Jones*. There was no evidence that she was seduced by *W. Farmer*; there is some, though not conclusive evidence, that he was intimate with her, but none that he used improper influence over her to obtain this deed; it was her voluntary act.

It is not indispensable, and it is never required in Courts of Equity, that adequate value should be shown to be given in arrangements between members of a family for the disposition and settlement of their property. But there does not appear to be any want of adequate consideration for these conveyances; for as to *J. Jones* he had no freehold interest beyond his life estate, which terminated before this suit was commenced. There is no doubt, upon the true construction of the appointment in the indenture of 1820, that the whole of *Bill's Lands* passed to the uses of the settlement; and as to *Elizabeth*, the 5000*l.* secured to her by bond of *W. Farmer* included not only the price of her moiety of the *Hill Farm* and some personal estate of her own, but also part of the personal estate of *J. Jones*, who was desirous to make up 5000*l.* for her fortune.

These are all completed transactions; they were begun

and completed with the knowledge of the appellant, who not only acquiesced in them during and after *W. Farmer's* death, but upon the latter event entered into possession of all the estates, real and personal, as the widow of *W. Farmer*, and in her answer to the bill filed against her by her daughter, admitted her title to the real estates in question as the heiress of *W. Farmer*, thereby admitting the validity of the conveyances; she is therefore estopped from denying the title of the respondent to the same estate as heir-at-law of *Fanny Farmer*.

The appellant claims as heir-at-law of *John* and *Elizabeth Jones*; and her bill prays for a reconveyance of the real estates, but the deeds comprised personalty as well. It is impossible to undo these transactions partially, and if they were to be set aside, restitution of the personalty must be made by the appellant to the personal representatives of *John* and *Elizabeth Jones*. She is not their personal representative, and there is no such representative brought before the Court. The statements and allegations in the bill to sustain the relief prayed are inconsistent and contradictory, and are not only not proved by her witnesses, but even disproved by the general evidence in the cause.

Mr. *Turner*, in reply, again read the evidence as to the capacity of *J. Jones*, and concluded from it that, though he was not an idiot, he was not able to understand a complicated transaction like the alleged bargain with *W. Farmer*. With respect to the objection to the frame of the bill for want of personal representatives of *John* and *Elizabeth Jones*, the matter stood thus: The appellant made no claim against their personal estates: The bond for 5000*l.* given to *Elizabeth* was by her assigned to the appellant, and vested in her husband, upon whose death it would, if it existed, belong to the appellant as his personal representative. She is answerable to his creditors, if any re-

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main unsatisfied. She closed the transaction as to the by cancelling it. The personal property of *John* and *Elizabeth Jones* was all disposed of by the transactions in question; and all that the bill seeks is *Elizabeth Jones's* moiety of the *Hill Farm*, for which no consideration, in the event that happened, was ever given. If, however, their Lordships should be of opinion that the personal representatives of *John* and *Elizabeth Jones* should be parties to the suit, then let the appeal stand over until the bill is amended. As, however, the Vice Chancellor's decision proceeded on the merits, and the merits were now submitted, displaced, he hoped their Lordships would reverse the decree, or direct an issue for the purpose of ascertaining the capacity of *J. Jones*, and the value of *Elizabeth's* moiety of the *Hill Farm*, and whether the nature of the transactions had been explained to her.

July 25.

The *Lord Chancellor*.—In this case the bill was brought by the widow of *William Farmer*, to set aside two conveyances executed in the year 1827, by one of which it is alleged that *John Jones*, her father, transferred all his interest in certain property to *W. Farmer*, her husband, and that the other *Elizabeth Jones*, her sister, assigned certain interest which she had, to the same *W. Farmer*; and the bill prayed to set aside the two conveyances; as to *John Jones*, on the ground of incapacity and infirmity in him, and advantage taken of that infirmity; and with regard to the proceedings of *Elizabeth Jones*, on the ground of her having been seduced by *W. Farmer*, by which great influence and power was obtained by him over her, by means of which he induced her to execute the deed in question.

The Vice Chancellor was not satisfied that there was evidence showing that there was fraud and misconduct in obtaining these deeds, and he dismissed the bill. And to the conclusion, to which his Honour came, I entirely assent.

If this case were looked at simply upon the evidence, I think it would wholly fail in showing that a case is made out, which would justify a Court of Equity in interfering to set aside a concluded transaction. But independently of that, there is a very great peculiarity in this case, that for a great length of time, and pending the interest of the daughter of the plaintiff, no attempt was made to complain of the transaction, which is now the subject of this suit. If this property had remained in *John Jones*, it would have come to the plaintiff, as his heir at law. If it was transferred to *W. Farmer*, it would then have descended to his daughter. The daughter died in 1839, and up to that period no complaint was made of the transaction in question, nor any attempt made to set it aside.

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It may, no doubt, be said that during this period of time the mother was not called upon, and was not very likely to interfere for the purpose of taking, as between her and her daughter, any step to disturb the arrangement that had taken place. But it must be recollected that these transactions related not only to lands, but that a great portion of personalty was included in them, and therefore that opens another question, which I think would of itself have been fatal to this suit, even if the facts had been much stronger than they appear to be.

*John Jones*, it is alleged, was, at the time this transaction took place, entitled to one moiety of *Bill's Lands*. It is said that, on the marriage of the appellant, who was entitled by a settlement made on her father's marriage to one moiety of land called the *Hill Farm*, her father, who was absolutely entitled to *Bill's Lands*, settled one moiety of that estate on her, reserving the other moiety to himself. The Vice Chancellor in giving his judgment intimated a very strong, and indeed a very conclusive opinion, that the effect of the deed was to settle the whole of *Bill's Lands*; there being an inconsistency between the different parts of the deed, which operates as an appointment



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and as a conveyance. If the appointment be looked at, it operates on the whole of *Bill's Lands*; but when you come to the conveyance, it proposes to deal only with a moiety. The Vice Chancellor was of opinion that, as the proper mode of transferring that interest was by appointment, and the appointment applied to the whole land, the whole of that interest had passed by that deed. If that be so, *John Jones* had no interest whatever in *Bill's Lands*, beyond his life interest, to transfer to *W. Farmer*, by the conveyance of 1827; and therefore if that transaction were set aside, nothing would descend on his heiress-at-law. His life interest lasted from the year 1827 until the time of his death in 1836. If the deed therefore were void, he would be remitted to his life interest, and the consideration which he received, of course, would be to be returned. That, however, was very small. Upon that transaction the result would be that the personal representative of *John Jones* would be the party essentially and alone interested in the question if the whole of *Bill's Lands* passed by the deed of 1820. But even if a moiety of *Bill's Lands* remained in *John Jones* after the settlement of 1820, the life income to which he would be remitted by setting aside that transaction, would be a benefit going to his personal representative, and there is no personal representative before the Court. The suit is brought by the heir-at-law alone, alleging that the property was taken improperly from *John Jones*, which otherwise would have descended on her. But there is no party brought before the Court interested in the question of the personalty which would arise, and necessarily come to be decided, growing out of that transaction.

With regard to *Elizabeth Jones*, she undoubtedly had a vested interest in one moiety of the *Hill Farm*; but there is a total failure of evidence to show any oppression or influence used towards her. The property was transferred to her brother-in-law, and there is nothing but the

fact, more or less to be believed, open certainly to some doubt, as to the connection which is alleged by the appellant to have existed between *W. Farmer* and her. But there is a total failure of evidence to show whether that connection had taken place or not, or that there was that degree of oppression used with regard to her as to justify the Court in setting aside the transaction. And with regard to her also, if the transaction should be set aside, then the 5,000*l.* which she was to receive, and for which she obtained security, as to the consideration of 2,800*l.* for her interest in that property, and as to 2,200*l.*, a debt alleged to be due to her from *W. Farmer*, would, of course, have to be dealt with. But the suit does not bring any person before the Court interested in that subject.

Then she assigned her interest in the 5,000*l.* to the appellant, and the appellant is claiming it as assignee of the purchase money, and as assignee of the purchase money, she is seeking to set aside the transaction, which is the consideration for the money. How comes she to claim as assignee of the purchase money in the transaction? She does not renounce; she does not repudiate it; she does not say "this is a sum of money which I do not wish to receive, and to which I am not entitled, because it was the result of a fraudulent transaction between my sister *Elizabeth* and *W. Farmer*," but she claims as assignee, and takes the benefit of the assignment so long as it is convenient to keep it in that quality, and then, when it is more convenient to her to do so, she seeks to set aside the conveyance from her sister to *W. Farmer*, but does not bring before the Court any person interested in the question of personalty, which would necessarily arise if that transaction were set aside.

I think the case totally fails upon the merits. I think that there is a deficiency of evidence to show that the transaction ought to be set aside; and I am of opinion also

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that, from the way in which this suit is framed, it resolve itself into a mere question of want of part into misapprehension of the shape and form in the claim ought to have been brought forward; grounds I think the decree below was correct, and your Lordships would do right to affirm it with costs.

Lord *Brougham*.—I have no doubt whatever upon the question of fact that the Vice Chancellor of *England* has come to a right conclusion, and that this decree ought to be affirmed with costs.

With respect, in the first place, to the capacity of *Jones* to make the conveyance which he did, and with respect to the validity of that conveyance under the circumstances, I have no doubt whatever upon the facts.

With respect to what is set up about *Elizabeth*, she yielded to the pressure of extraordinary influence of *W. Farmer*, in consequence of the connection said to have subsisted between them, it did not appear to me, from the evidence, at all clear that that connection did exist. Supposing it did, it does not at all follow, from admitting the connection, that therefore she should be so completely under that influence. It was not of that nature to produce as a necessary consequence that what she had done ought to be made void; even admitting it to have been proved, which I do not think was sufficiently proved, that she was under that influence, and that that influence was exerted over her. It is upon these grounds that I have no doubt that we ought to affirm the decree of the Vice Chancellor.

With regard to another point; I had, at one time, upon the argument, some little doubt with respect to the point upon which my noble and learned friend seems to be entirely of opinion with the Vice Chancellor, namely, with respect to the appointment extending over the moiety of *Bill's Lands*, and the conveyance which extended to the moiety. That is a very material point, no doubt in the case, whether, independently of the question as

condition of *J. Jones* to make the conveyance, and as to the free will of *Elizabeth*, or the pressure upon her, there was sufficient in the present frame of the suit to justify the decree. Upon that I had some little doubt, but that doubt is very much removed, first, by considering the very clear and unhesitating opinion which his Honor expressed upon that, and secondly, by the opinion of my noble and learned friend, who appears to go along with the opinion of the Vice Chancellor. It is unnecessary for me to say more upon that question, than that, whichever way you dispose of that question, it appears to me there is enough to sustain the decree below, without deciding that question, because the decree cannot be set aside unless we are against the Vice Chancellor upon both the other points; we must be against him upon the ground of *John Jones's* conveyance not being valid, and upon the ground of *Elizabeth Jones's* conveyance not being valid in consequence of the pressure exercised upon her mind at the time; but being for the decree on both those points, the other point, respecting the moiety, becomes comparatively immaterial, even if we were against the Vice Chancellor upon it. I have no hesitation whatever in recommending your Lordships to affirm the decree, with costs. This is a mere question of fact and circumstantial evidence, and when the Court has given an opinion one way, we are not likely to reverse it, unless we were quite sure that it was wrong.

The *Lord Chancellor*.—There were two appeals. Who was the plaintiff in the second cause?

Mr. *Turner*.—*James Farmer*, the respondent, claiming under the deeds for a partition of the estates.

The *Lord Chancellor*.—The decree in that cause is of course, being for a partition, assuming the property passed to *W. Farmer*, and the appeal against that also must be dismissed with costs.

It was ordered that both appeals should be dismissed, with costs.

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 15 March. JOHN SIMMONDS, AND OTHERS - *Defendants in Error.*  
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*Bankruptcy.*  
*Trading.*  
*Interpleader.*  
*Feigned Issue.*  
*Writ of*  
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If a writ of error does not lie in a particular case, the Court of Error may properly—upon a rule obtained for that purpose—order the writ to be quashed.

A writ of error, alleged error in the judgment in “an action on promises.” The transcript of the record shewed that the judgment was given, not in an action on promises, but on a feigned issue: Held, that this was a fatal variance, and that the Court of Error was warranted in quashing the writ.

A person who keeps a lodging-house, and supplies the lodgers with food and wine, is a trader within the meaning of the bankrupt laws.—*Per Lord Brougham.*

A writ of error will not lie on a judgment on a feigned issue directed under the Interpleader Act.—*Per Lord Brougham.*

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THIS was a writ of error, on a judgment of the Court of Exchequer Chamber, by which a writ of error brought in that Court upon a judgment of the Queen’s Bench had been quashed(a). The main question intended to be raised, was on the construction to be put upon the statute 1 & 2 W. 4, c. 58 (b). The circumstances out of which the case

(a) 14 Law Journ. N. S., Q. B., 248; 7 Q. B. 289.

(b) 1 & 2 W. 4, c. 58. The preamble to which recites,—  
 “Whereas, it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in Equity against the plaintiff and such third party, usually called a bill of

arose, were these:—A person named *Emily Ann Birch*, had carried on the business of a lodging-housekeeper, and being, as it was alleged, indebted to *William Henry King*, and the debt being secured by a warrant of attorney, he had issued a *fieri facias* against her goods, and taken them in execution. A fiat in bankruptcy had been issued

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interpleader, which is attended with expence and delay.” The section then goes on to enact, that upon application by a defendant, “in any action of assumpsit, debt, detinue, or trover,” stating that the right in the subject matter is in a third party, the Court, or any judge thereof, may order such third party to appear and maintain or relinquish his claim, and in the meantime stay proceedings in such action, and finally, to direct a feigned issue, or, with the consent of the plaintiff and such third party, to dispose of the merits in a summary manner, and to make such rules and orders as to costs as may appear just and reasonable.

Sect. 2 declares “that the judgment in any such action or issue as may be directed by the Court or Judge, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them.”

The sixth section, reciting that difficulties sometimes arise in the execution of process by reason of claims by assignees, &c., “whereby sheriffs and other officers are exposed to the hazard and expence of actions, and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers,” enacts that it shall be lawful for the court to call before it the parties, and to make such rules as shall appear to be just, and the costs are to be in the discretion of the Court. (The 1 & 2 Vict., c. 45, s. 2, reciting this enactment, gives to “any Judge” of one of the Courts at Westminster, the same power that is here given to the Court.) The 7th section (1 & 2 W. 4, c. 58) directs, “That all rules, orders, matters, and decisions, to be made in pursuance of this act, &c., may be entered of record;” and “every such rule or other order so entered, shall have the force and effect of a judgment except only as to becoming a charge on lands, &c.,” and if the costs shall not be paid, a *fi. fa.* or *ca. sa.* may issue for them, and the sheriff shall be entitled to his fees thereon, “as upon any similar writ grounded upon a judgment of the Court.”

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against her by certain persons who were her creditors, and their rights, and those which *King* alleged he possessed, came into competition. The sheriff applied to the Court, under the Interpleader Act, and Lord *Denman*, sitting at chambers, on the 14th of March, 1842, directed a feigned issue under the 1 & 2 *Wm.* 4, c. 58, to be tried between the parties, the questions or issues in which were afterwards amended by an order of Mr. Justice *Coleridge*. The declaration in this feigned issue was in the following form:—

“Middlesex to wit, *George Gibson* (a), *John Simmonds*, &c., the plaintiffs in this suit, assignees of the estate and effects of *Emily Ann Birch*, a bankrupt, according to the statutes in force concerning bankrupts, by, &c., complain of *William Henry King*, the defendant in this suit, in pursuance of a certain order, made by the Right Honourable *Thomas Lord Denman*, on the 14th day of *March*, in the year of our Lord 1842, under and by virtue of the 2nd section of a certain act of Parliament in a certain cause wherein the now defendant was plaintiff, and the said *Emily Ann Birch* was defendant, whereby it was ordered, ‘That the sheriff do pay the proceeds of the execution therein into court in five days; that an issue be tried, in which the claimants or assignees, when chosen, should be plaintiffs, and the execution creditor defendant, and the question of costs was thereby reserved.’ And in pursuance of a certain other order made by the Hon. Mr. Justice *Coleridge*, in the said cause, on the 14th day of *July*, in the year of our Lord 1842, whereby it was ordered, ‘That the order made in the said cause by the Right Honourable Lord *Denman*, on the 14th day of *March*, 1842, be amended, by directing that the issue to be tried be as to the liability of the goods to be seized at the time of the levy, and as to the title of the assignees thereto. For that

(a) Mr. *Gibson* died shortly afterwards, and all the proceedings were continued in the name of Mr. *Simmonds* and the other assignees.

whereas."—The record proceeded in the usual form, setting out the declaration, the issues, the *venire distringas*, &c., and alleging a promise by the defendant to pay 10*l.* if the goods were liable to seizure, and a breach of that promise. *King*, by a plea in the usual form of a plea to an action, admitted the promise, but denied that the goods were liable to seizure. By a second plea he denied the title of the plaintiffs as assignees.

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The trial of the issues thus directed came on before Mr. Justice *Wightman*, at *Westminster*, at the sitting after *Hilary Term* 1843. The facts that *Emily Ann Birch* was a lodging-housekeeper, and that she supplied food and wines to her lodgers, having been proved, the question was argued whether such a lodging-housekeeper was, under the 6 Geo. 4, c. 16, s. 2 (*a*), liable to a fiat in bankruptcy. The learned Judge held the affirmative, and so directed the jury. The counsel for *King*, the plaintiff in error, tendered to that direction a bill of exceptions, which was duly received and sealed by the Judge. The verdict was then taken for the plaintiffs.

The *postea* set out the finding in the following terms: "And the jurors assess the damages of the said plaintiffs by reason of the not performing the within mentioned promises and undertakings, over and above their costs and charges by them about their suit in that behalf expended, to 1*s.*, and for those costs and charges to 40*s.*" There was then a prayer and an award of judgment in the usual form: "It is considered, &c., that the said *John Simmonds*, &c., do recover against the said *W. H. King* their damages, costs, and charges by the jurors aforesaid, in form aforesaid assessed."

Judgment on this finding was entered up by the Court of Queen's Bench, in *May* 1844, in accordance with the

(*a*) Where, among the persons enumerated as liable to the bankrupt laws, are "keepers of inns, taverns, hotels, or coffee houses."



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learned Judge's direction ; and *King* then brought a writ of error in the Exchequer Chamber. Before the case came on for argument upon the writ of error, the defendants in error obtained a rule (a) to quash the writ, upon the ground that in a proceeding under the 1 & 2 W. 4, c. 58, it was not competent to either party in such proceeding to tender a bill of exceptions to the Judge's charge, or to bring a writ of error on the judgment of the Court. In answer to this objection it was insisted on the part of *King* that the Court of Error could know nothing but what was disclosed on the face of the record, and that by the record, the proceeding appeared to be a regular action of assumpsit commenced by writ of summons. The Court of Exchequer Chamber enlarged the rule for the purpose of enabling an application to be made at chambers to Mr. Justice *Wightman* to amend the record conformably to the fact. This application was discussed at chambers, and his Lordship directed the amendment to be made "by striking out the recital of a writ of summons therein, and reciting instead thereof the Judge's orders directing the said issue to be tried ; and that the plaintiffs be at liberty to amend the record accordingly, adding that the orders were made under and in pursuance of the statute." *King* then obtained in the full Court a rule to shew cause why this order should not be discharged, but, after argument, that rule was itself discharged, with costs, and the record was amended in the manner directed by the order. The rule which had, in the first instance, been obtained by the defendants in error to quash the writ of error, and which had stood enlarged during the discussion of these interlocutory orders in the Court of Queen's Bench, then came on to be heard in the Exchequer Chamber. The judgment of that Court was pronounced by Lord Chief Justice

(a) 7 Q. B. Rep. 292 n.

*Tindal*, to the effect that no writ of error would lie on a proceeding by interpleader, and that the Court of Exchequer Chamber had authority to quash such writ if improperly brought (*a*).

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The present writ of error was then brought against that decision.

Mr. *Pushley* for the plaintiff in error :

The substantial question on the record is whether, by implication to be collected from the act of Parliament, the common law right of the subject to a writ of error can in this case be taken away. The act on which this proceeding is founded is that of the 1 & 2 W. 4, c. 58 ; and the great reliance of the other side must be on the argument to be deduced from the phrase in the first section, which empowers the Court or a Judge to dispose of the claims of the parties, and “to determine the same in a summary manner.” But this phrase is governed by the preceding words, “with the consent of the parties,” and does not apply to the general provisions of the statute. The argument must therefore depend on the general principles of the law, and the case cannot be determined on the particular words of the statute alone.

The rule of law is, that the right to any common law benefit, where a new mode of proceeding is created in a Common Law Court, cannot be taken away but by express statutory provision. Such is the rule laid down by Lord *Mansfield* in *Hartley v. Hooker* (*b*). It was adopted in *The King v. Hube* (*c*), and again in *The King v. Wadley* (*d*). In *Albin v. Pyke* (*e*), notwithstanding the strong words of the act 5 & 6 W. 4, c. 23, it was held

(*a*) 7 Q. B. 289—309.

(*b*) Cowp. 523.

(*c*) 5 T. R. 543.

(*d*) 4 M. & S. 508.

(*e*) 4 Man. & Gr. 421.

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that the jurisdiction of the Superior Courts was taken away.

[Lord *Campbell*.—What is the meaning of the words “final and conclusive” in the second section ?]

Final and conclusive on the Court, and as to the Court which pronounced the judgment, but not final and conclusive on the matter, so as to prevent the party bringing his writ of error.

[Lord *Brougham*.—But in all cases the judgment is binding on the Court which pronounced it.]

The words in this act are of the same import as words in other acts, but they cannot be allowed by mere force of implication to take away the right of a subject to appeal to a Superior Court. The principle of law is distinctly stated in *Groenvelt v. Burwell* (a) Lord *Holt*, who said, “whenever a new jurisdiction is erected by act of Parliament, and the Court or Judge exercises this jurisdiction, acts as a Court or Judge, and the Record according to the course of the common law, the writ of error lies on the judgment.”

It may therefore be assumed that the rule is that a writ of error will lie on any judgment of a Court of Record, and the question consequently comes to whether the judgment in this issue is an exception to that rule. Now that question is in some degree answered in the case of *Bullen v. Michell* (b). There the question was, whether a bill of exceptions would lie even in the case of an issue out of Chancery, and Mr. Baron *Almon* observed, “I own I think a feigned issue does not differ from any other action, and that when once it gets into the Court of Law, it is subject to all the rights and remedies that other actions are.”

[Lord *Brougham*.—That certainly is not true ;

(a) 1 Salk. 263.

(b) 2 Price 399, 417

is no writ on which it is founded; you cannot move in the Court of Law for a new trial; there is nothing in common between an issue and an action except the mere form; you cannot demur in an issue.]

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It must be admitted that in many respects there is a wide difference between an issue and an action, but the ultimate rights of the parties interested must be the same in both. The distinction between them is explained fully in *O'Connor v. Malone* (a).

But even in the case of an issue from a Court of Equity, when a verdict is unsatisfactory, it may be set aside; *Tatham v. Wright* (b). That was done likewise in the case of *Giles v. Grover* (c), where the proceeding was on a feigned issue. In *The King v. Giles* (d), there had been an information in the nature of an action for a false return to a writ of extent. A writ of error was brought on that judgment, but the Chief Justices before whom the case was to have been argued, having objected to the form of the proceeding, and on that ground having reversed the judgment, a feigned issue was framed, a special verdict was given, and an argument on that took place in the Exchequer Chamber on the verdict given on that issue (e). The case was afterwards brought to this House upon a writ of error (c).

[Lord Campbell.—The proceeding there was specially directed for the purpose of putting the question on the record. Every thing that was done was by consent for that very purpose.]

[Lord Brougham.—Besides which, *The King v. Giles* was a common law case.]

The same course was pursued in *Snook v. Mattock* (f), the issue was directed by a Court of Law, and the Court

(a) 6 Clark & Finnelly, 572.

(d) 8 Price, 293.

(b) 2 Russ. & Myl. 1; 1

(e) 1 You. & J. 232.

Ad. & El. 5, n a.

(f) 5 Ad. & El. 239, 242.

(c) 1 Clark & Finnelly, 72.

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of Exchequer Chamber having quashed the writ of error, the Court of King's Bench intimated an opinion that the Court of Exchequer Chamber was wrong. That point, however, was not finally decided, but it is remarkable that, in delivering the judgment in which the Court of Exchequer Chamber directed the writ of error to be quashed, Lord *Lyndhurst*, C. B., expressly speaks of "a bill of exceptions on a feigned issue" as something which might properly be made the subject of a writ of error. And Mr. Baron *Parke* had before remarked that the Court had "previously entertained a bill of exceptions on a feigned issue."

[Lord *Brougham*.—That is impossible in a feigned issue from Chancery. The Court of Chancery knew nothing of a bill of exceptions. His Lordship, at a subsequent part of the argument, again referred to this point and added: The case on which Mr. Baron *Parke* has relied can be no other than that of *Armstrong v. Lewis* (b), but there it appears from the proceeding in Chancery that it was argued in the Exchequer Chamber by consent only; for the Master of the Rolls (c) who directed the issue "considered that no bill of exceptions would lie in such a case, and that an application ought to have been made to him for a new trial of the issues; but being deemed expedient by both parties that the questions of law should be brought before the Exchequer Chamber upon such bill of exceptions, the objection to its regularity was waived."]

But the rule as to issues from the Court of Chancery does not apply decisively here. It cannot be doubted that a bill of exceptions will lie as of right upon an issue directed by a Court of Law, under circumstances such as existed in *The Queen v. Marriott* (d).

(a) 5 Ad. & El. 243.

(b) 2 Cr. & Mee. 274.

(c) See *Armstrong v. Arm-*

*strong*, and *Armstrong v. L*

3 Myl. & K. 45, 52.

(d) 12 Ad. & El. 35 n (

The construction given to the statute of *Westminster 2* (Stat. 13 Edw. 1, c. 31), on the subject of bills of exceptions, furnishes a good analogy for that which ought to be put upon this statute. It has been a liberal, not a restrictive construction. On the words of that statute, "If any one shall be impleaded before the Justices of either Bench," it has been held that the Court of Exchequer was included. That instance justifies the argument, which is further confirmed by Lord *Coke's* Commentary (*a*), where it is said that error lies on all judgments of a Court of Record. In a case of this kind the proceeding has the form of an action, and a judgment is entered up.

In *Cooper v. The Lead Smelting Company* (*b*), which was an issue directed by the Court under the Interpleader Act, the Court said that it had no jurisdiction to proceed without a judgment being signed on the feigned issue; and in *Strother v Hutchinson* (*c*), the Court of Common Pleas held that a bill of exceptions would lie upon a nonsuit in a County Court. In delivering judgment in that case, Lord Chief Justice *Tindal* noticed that the words of the statute would appear to confine its provisions to the Court of Common Pleas alone, but that the Court must construe the act in the spirit of Lord *Coke's* Commentary, which had been uncontradicted to the present day, and that it was every day's practice to hold that the statute extended to the Queen's Bench and Exchequer; and he then decided that a Judge improperly directing a nonsuit, was one of those errors in judgment at a trial that fall within the provisions of the act. That principle of applying a liberal construction to the act was not for the first time adopted in that case; for the same rule had been applied in *Bulkeley v. Buller* (*d*) by Mr. Justice

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(*a*) 2 Inst. 427.

(*b*) 9 Bing. 634.

(*c*) 4 Bing. N. C. 83.

(*d*) 2 Barn. & Cr. 434, 445.

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*Best*, who expressly stated that the statute having passed to relieve parties from hardship, ought "to receive a liberal exposition."

There are only two instances in which it has been held that the statute of *Westminster 2*, does not apply. The first was Sir *Harry Vanes's Case* (a), where it was not to apply to criminal proceedings.

[Lord *Brougham*.—But that is now given up. The question was fully considered in the *King v. Crevy* (b), the statute was distinctly held to apply to misdemeanors.

The other instance was that of a summary proceeding before Justices at Quarter Sessions; and it was held in *The King v. The Inhabitants of Preston-on-the-Hill* that it would not lie to the Queen's Bench in such a case.

[Lord *Campbell*.—Here the question is not as to the existence of exceptions, but to a writ of error.]

But the construction of the statute as to one, assists the argument as to the statute which applies to the other. A Judge at chambers cannot determine a course of proceeding which shall take away the right of coming here.

[Lord *Campbell*.—Is it not in the discretion of the Judge either to direct an action or an issue?]

It may be; but that fact is sufficient to shew that, in the one case as in the other, the same practice must exist, and the same rights be capable of exercise, otherwise the distinction would amount to a power, by the mere will of a Judge at chambers, to change the nature of a remedy.

[The Lord Chancellor.—There is a marked distinction between an issue in Chancery and an issue under this Act. For in Chancery, the issue really does exist, and the proceeding by trial is merely a proceeding to inform the Court of the result of the trial; but here the original proceeding is by writ, and the issue is merely a proceeding to inform the Court of the result of the trial.]

(a) 1 Lev. 68; 1 Siderf. 84; St. Tr. 132 n.  
 1 Kel. 15. (c) Cas. Temp. Hard.,  
 (b) M.S., and see 6 Pow. 249.

ing, which is against a stakeholder, does not raise the same question, nor raise the question between the same parties as the feigned issue does. I do not well see how this could be brought under review, if the feigned issue is merely directed to let the Court know what is the verdict of a jury upon a particular set of facts.]

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It was assumed by the Exchequer Chamber that an action was a proceeding by writ, and that an issue, not being founded on a writ, was not an action. But that argument cannot be maintained. In all its forms an issue is an action, throughout these proceedings it is called "a plaint;" and the record states that "*Simmonds* complains of *King* in this suit;" and the defendant pleads that "the plaintiff ought not further to have or maintain his aforesaid action thereof against the defendant."

[*Lord Campbell*.—But the record shews that all this was done under the direction of the Court.]

It does so; but it also shews that there was a plaint which brings it within the description of an action at law, and all the incidents of an action at law then attach upon it.

A feigned issue under a local act has been treated by the Court of Common Pleas like an action of assumpsit, for the purpose of the costs: *Earl Fitzwilliam v. Maxwell* (a).

[*Lord Brougham*.—That has nothing to do with the matter. You cannot say that the costs here or in an issue from Chancery would be within the statute of *Gloster*.]

But that case shews that a feigned issue has been treated by a Court of law as falling, for one important purpose at least, within the general term, action. If so for one purpose, why not for another?

Then, as to the quashing the writ; the word "action," which the proceeding is called in the plea, is sufficiently

(a) 7 Taunt 31.



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large to include every proceeding at law, whether criminal or a civil nature; and there is no variance between the writ of error and the record which brings for the word action is the same as plaint or as issue, certainly includes them both. But if there had been a variance, then it was the duty of the Court below to allow and not to quash the writ of error. The case of *2 Kaye (a)*, is not an authority the other way, for the issue of fact remaining undecided, the record was on the face of it, defective in matter of substance, and the writ was properly treated as prematurely issued and was quashed, because in fact, there was no finding on which it could operate. In *Metcalf's Case* was held that, in account, no writ of error lies against judgment *quod computet*, before final judgment; reporting the case, Lord Coke expressly, and with great formality, declares that "of such awards which are *tali grave damnum* of the party, a writ of error lies although the principal judgment was never given. In *Bacon's Abridgment (c)* it is said that the writ is "an award in the nature of a judgment;" and in this instance is given, "If a man is indicted for felony thereupon a *capias* and *exigent* are awarded, but before any attainder, his administrators may have upon this award of the *exigent*, because by the award of the *exigent* his goods were forfeited, and this is *ad gratiam*, though the principal judgment can never be given."

The course hitherto has been for the Courts to allow and not to quash, on motion, proceedings which, if thus allowed, leave a party without any remedy. In *Saunders v. Teague (d)*, the Court refused to stay proceedings on a writ *de homine replegiando* brought against the defendant for detaining the plaintiff's wife, though after app

(a) 6 Man. & Gr. 536-590.

(b) 11 Rep. 38 a.

(c) Bac. Abr. Error.

(d) 1 Wils. 256.

and before plea, the wife had died. The principle on which the Courts proceed in that and similar cases, is stated by Lord Chief Justice *Tindal*, in giving the judgment of the Court in *Davies v. Lowndes* (a), where he said, on a motion to quash a writ of right sued out after the 3 & 4 W. 4, c. 27, that a similar application had been made to the Lord Chancellor, but that "the Lord Chancellor (b), after expressing an opinion, in terms which it is impossible to misunderstand, that the writ was not maintainable by law, upon the ground of the first objection, declined however to act upon that opinion by quashing or setting aside the writ, on the ground that the same objection might be raised upon the record in an ulterior stage of the proceedings." His Lordship added, "the same objections have been raised before us, and we have come to the same conclusion as that adopted by the Lord Chancellor, and for the same reason, namely, that we ought not, upon a summary application, from which there can be no appeal, to decide upon a question which involves the final determination of the rights of the parties, when the very same question may be raised on the record, and thereby, not only the judgment of this Court be obtained, but, if thought necessary, the judgment of the Court of ultimate appeal."

It is submitted, therefore, that on general principles of law, a writ of error will lie in this case; that the particular words of the statute do not deprive the party of the right to bring error, and that the supposed variance between the record and the writ does not affect the case, and if it did, that the writ ought to have been amended and not quashed.

The *Lord Chancellor* intimated the opinion of the House to be that if the writ of error did not lie, the Court below was right in ordering it to be quashed.

(a) 13 Law J., C. P. 221; 2 Dowl. & L., 272. (b) *Davies v. Lowndes*, 1 Phill. 328, 336, 341.

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Mr. *Crompton* for the defendant in error :

The record here declares that the action is brought on a feigned issue under the direction of a single Judge. That distinguishes the present case from *Snook v. Mattock (a)*, where the hesitation of the Court to quash the writ arose plainly from the fact that the record did not disclose the objection to the maintenance of the writ. There is no necessity to go into the general doctrines of law or equity. The terms of the statute shew that the writ of error will not lie. The purpose of the act was to put a feigned issue arising on an interpleader under the statute, on the same footing as a feigned issue from the Court of Chancery. The preamble expressly refers to the bill of interpleader in Equity, and proceeds to provide against a third party being compelled to go into Equity, by providing that he shall, by the act of the Court, be relieved upon application to the Court. Throughout the act it is plain, that in the Common Law Courts, as in the Court of Chancery, the sole purpose of the proceeding was to inform the mind of the Court. The party to the issue does not recover a substantive verdict. The judgment to be entered up is, not that he shall recover the subject matter of any suit, but that he shall recover one shilling.

This writ of error cannot be maintained : first, because there are no writs of error allowed on like proceedings in Equity, and these proceedings in interpleader are assimilated to proceedings in Equity, and must follow the same rules, unless the Statute of Interpleader actually gives a writ of error, which it does not ; secondly, because there is a variance between the record and the writ ; and, lastly, it is submitted, that as no writ of error can lawfully be maintained, the Court of Exchequer Chamber did right in quashing the writ. The House has already relieved the defendant from the necessity of maintaining the last proposition.

(a) 5 Ad. & El. 239.

In feigned issues, directed by the Common Law Courts, as in feigned issues from Chancery, the form used to be that of a wager, but that form is now abandoned; and the record distinctly states that the Lord Chief Justice desires to be informed, &c. It is said, that notwithstanding this form, it is a rule of law that a writ of error is maintainable on all judgments at law, and that the judgment in such an issue is not an exception to the rule. That statement is erroneous. There is no judgment, properly so called, in such a proceeding. The Judge merely desires to be informed of a certain fact, and his decision on that information merely affects a matter of costs. Now, no writ of error or appeal will lie to this house on a simple matter of costs. In case of *Giles v. Grover* (a), which was an information, in the nature of an action for a false return to a writ of extent, the proceeding, by a feigned issue, was arranged by consent of the parties, and this question could not therefore arise, nor did it ever occur till the case of *Snook v. Mattock* (b). There the question came, for the first time, directly before the Court, and the Court of Exchequer Chamber quashed the writ. It is said that Mr. Justice *Patteson* afterwards expressed some doubt as to that course of proceeding; but his words are (c)—“It is unnecessary to give any opinion on the power of the Court of Exchequer to quash the writ of error, as to which I entertain some doubt;” and these words apply not to the question of such a writ lying in such a case, but to that of the particular mode adopted by the Court of Exchequer to put an end to it. As to that, however, it is submitted that the Court of Exchequer Chamber was right.

It is admitted that a bill of exceptions will not lie on a feigned issue from the Court of Chancery. Then why should it lie on a feigned issue from any other Court?

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(a) 1 Young & Jervis, 232; (b) 5 Ad. & El. 239.  
1 Clark & Finnelly, 72. (c) *Id.* 249.

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Where is the distinction between the two cases? There is none. Other cases likewise furnish an analogy as to the maintenance of a writ of error upon an issue under the Interpleader Act. In the instance of the Joint Bank Act, there were questions as to the mode by which the members of a company could be made parties to proceedings. The act says that execution may be laid out against the members, but the question was, how was to be done; whether by *sci. fa.* or by suggestion entered on the roll. As to the latter, it was answered that could not be done satisfactorily without an issue, and if there was an issue there would not be the necessity of trying the decision of that by a writ of error, and that was the reason why the Courts decided that the proper mode of proceeding was by *scire facias*; *Cross v. Law* (a) that case Lord Abinger, in giving the judgment of the Court, thus explained the reason why the Court preferred the proceeding by *scire facias* to that by suggestion: "We think this case is of too much importance for us to put any construction on the act of Parliament by which the parties who might wish to take the opinions of all the Judges would be prevented from doing so."

In *Dickinson v. Eyre* (b), the Court of Queen's Bench decided that a verdict on a feigned issue, under the Interpleader Act, must be entered up as the seventh section of that act directs, and therefore a judgment signed in the ordinary manner was set aside by the Court. That is a decision which shews that a writ of error will not lie on such a judgment, which is one of a peculiar and not of an ordinary kind, and it disposes of the case of *Cross v. The Lead Smelting Company* (c), which, when properly examined, only appears to decide that some question must be done which, in another case, would be equivalent to signing judgment.

(a) 6 Mee. & W. 217, 223.

(b) 7 Dowl. P. C. 721.

(c) 9 Bing. 634; 11

P. C. 728; 3 Moore & S.

[The *Lord Chancellor*.—The cases of an issue directed by the Court of Chancery, and an issue directed by a Judge at chambers, have been assimilated to each other. But there is a great distinction between the one and the other. In Chancery the case would come back to the Judge who directed the issue, to be by him dealt with as justice might require, and if he is wrong, his decision may be set right by this House. But if the Judge at chambers has all the powers now contended for, and there are no means of bringing a writ of error, he cannot be set right at all.]

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That certainly is so; but otherwise there might be a greater delay than by a suit in Chancery, and it was to avoid that consequence that the statute in question was passed. This is not the only case in which such a result would occur. It would occur in some cases of *certiorari*, and in cases of *habeas corpus*. In this case, when in the Exchequer Chamber (a), Mr. Baron *Alderson* gave the true answer to the argument on the other side, when he said that “the issue was only on a collateral point.”

Then as to quashing the writ, the writ was rightly quashed in this case, because, as in *Tolson v. Kaye* (b) there was nothing on which the jurisdiction of the Court of Error could attach. The want of jurisdiction is patent on the face of the writ, and where it is so, the writ, as in *Lord Saye and Sele v. Stephens* (c), ought not to be allowed. The variance between the record and the writ being clear, the Court of Error had no other course to adopt but that of quashing the writ. The Exchequer Chamber could not, on such a ground, send back the case to the Court below, but was obliged to deal with it as presented to the Court of Error. The proceedings, shewing on the face of them, that there was nothing to found the jurisdiction of the Court, the

(a) 14 *Law Journ.* 248, 252;  
 7 *Q. B.* 303.

(b) 6 *Man. & Gr.* 536.  
 (c) *Cro. Car.* 142.

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only proper course was to quash the writ, and neither to affirm nor reverse the judgment, over which, in truth, the Court of Error had no lawful jurisdiction.

Mr. *Pashley* replied.

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Lord *Brougham*.—In this case I have consulted with my noble and learned friend who holds the Great Seal, and he has given me his opinion, which is entirely the same as my own, upon the case; and he approves of the course which, with your Lordships' approbation, I now propose to take.

This was a feigned issue tried before Mr. Justice *Wightman*, and a bill of exceptions was tendered by one of the parties, the defendants in that feigned issue, to his Lordship's direction to the jury to find that a person of the name of *Birch*, whose assignees were the defendants in the action, was a trader within the bankrupt law.

I will state what formed the grounds of the decision of the Court of Queen's Bench, because that decision being brought before the Exchequer Chamber, gave rise to the question which is now before this House. It appeared that Mrs. *Birch* lived in *Bedford-square*, and kept there an extensive lodging-house, and that she had a very considerable number of lodgers in that house, who paid her not only for their lodging room, but also for their meat, drink, and entertainment in that house, and who took rooms, more or fewer, and for a greater or a less period of time—sometimes for a week—sometimes for a month, and sometimes even for a year. It was given in evidence that she wrote to Messrs. *Spencer*, the wine merchants, to this effect:—"Mrs. *Birch* begs Messrs. *Spencer* will not be surprised at the magnitude of the order she is about to give them for wine, as she does not intend to drink it all herself." After observing which, she proceeds to give the order, thus:—"this she thinks but justice to herself to state, but she has those in her house who do drink

much, if it is good ; and all who have tasted the sample Messrs. *S.* sent in, gave it as their opinion that it is very good ; this, to say the least of it, is very satisfactory, therefore shall be obliged by their sending in twenty dozen of the same port, and twelve dozen of their brown sherry."

Now, upon this case, involving circumstances such as I have stated, Mr Justice *Wightman*, who tried the cause, held, and so directed the jury, as I am sure I should have done if I had tried that cause, and so would my noble and learned friend near me, that she was a hotel keeper, though not by a sign : a sign is quite immaterial to any body. Instead of putting up the Red Dragon, or whatever sign this good lady might have chosen to hold out to the public, she chooses to have merely a house in which she takes sometimes three or four lodgers, besides having several of her own relations living there, all of whom, all paid her, the relations as well as the others ; and all these persons she supplies with food and liquor as well as with lodging.

It appears to me that it is clear, that this was the trade of a hotel keeper, and that she was a trader within the bankrupt law. Not so thought the learned counsel, for they tendered a bill of exceptions to the learned Judge's direction, and that brought the matter, as your Lordships are aware, by writ of error before the Queen's Bench.

The judges of that Court took the view of the case that we are disposed to take : they held that she was a trader, and therefore overruled the bill of exceptions, whereupon a writ of error was brought from their judgment into the Exchequer Chamber. A motion was made to amend the record, which had been inartificially framed, and to make it appear what the truth really was, that it was not an action, but a feigned issue, for it was a feigned issue which had been directed by Lord *Denman*, under a very beneficial act, commonly called the Interpleader Act.

So when it came before the Exchequer Chamber a

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course was taken by the defendants in error against plaintiff in error, which prevented the Exchequer Chamber from ever pronouncing an opinion at all upon the merits of the case, as they had appeared before Mr. Justice *Manly*, and before the Court of Queen's Bench, namely upon the question, trader or no trader as hotel keeper, in the case of *Mrs. Birch*; for the defendants took the objection that a writ of error does not lie upon a feigned issue. They moved to quash the writ of error upon that ground. They also moved to quash it upon another ground. At least the Court of Exchequer Chamber held that there was no competent reason to quash the writ of error upon that ground, and that too in whatever way the other and more important question, namely, writ of error or no writ of error upon a feigned issue under the Interpleader Act, might be decided (for there is no doubt that it is confined to the scope of the Interpleader Act entirely, though a doubt upon that was raised). That, independently of that, there was a fatal variance between the transcript of the record of the judgment sent up to the Court of Queen's Bench, and the writ of error. That objection therefore, if decided for the defendants, would shut out of course all question of error upon the writ of error, and therefore, whether the Court of Queen's Bench was right or wrong became quite immaterial. A writ of error could lie.

That therefore came on to be decided by the Court of Exchequer Chamber, and the judges took time to consider it. It was admitted on all hands that no writ of error could lie on a feigned issue directed by a Court of Equity. That was admitted on all hands, as equally incontestable, that a writ of error could lie on a feigned issue directed under the ordinary jurisdiction of the Court of Queen's Bench, Common Pleas, or Exchequer. But then it was held that, by the peculiar framing of the words used, relating to a judgment, in the Interpleader Act, the case before the Court was different from the common case of a feigned issue.

issue, and that a writ of error would lie in a proceeding of this kind. Upon that there was a very able argument before the learned Judges below, and it was contended that a writ of error did lie, notwithstanding that it was a feigned issue, regard being had to the peculiar provisions of the Interpleader Act.

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The court took time to consider, and Lord Chief Justice *Tindal* fully discussed that question in a very able and elaborate judgment, in which he gave the opinion of the whole Court of Exchequer Chamber, all the learned Judges concurring, those learned Judges being, my Lord Chief Justice himself, who presided, Mr. Baron *Parke*, Mr. Baron *Alderson*, Mr. Baron *Rolfe*, Mr. Baron *Platt*, Mr. Justice *Cresswell*, and Mr. Justice *Coltman*; I may be allowed to say a very full Bench, because the Queen's Bench being the Court from which the writ of error was brought, the Judges of that Court could not be there, so that those seven, and the five Queen's Bench Judges, making twelve, there were only three Judges who were not there who could possibly have taken part in the decision. Therefore it is a decision meriting the greatest respect and commanding the greatest attention. Nevertheless if your Lordships, upon more mature consideration, as the Court of last resort, should differ from those learned Judges, though they were unanimous in the judgment, and unanimous, I believe, after the fullest consideration, and after acknowledging the difficulty of the case, you are not bound, of course, by their judgment; in which case the question will arise, and not till then, whether the Court of Queen's Bench was right or wrong upon the question brought before it, by the bill of exceptions to Mr. Justice *Wightman's* ruling, namely, upon the question whether Mrs. *Birch* was a trader within the bankrupt laws or not. But at present that does not arise, if we are of opinion that the Court of Exchequer Chamber, upon either of those two grounds, was right, either upon the variance between the transcript of the

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record, and the writ of error, or upon issue under the Interpleader Act, of error; if upon either of those the Judges in the Court of Exchequer question does not arise. If we question does arise, and must be either send it back to the Exchequer shall be at liberty to decide the case.

Now, my Lords, I am of opinion that the *Tindal* and the Court of Exchequer were right, at all events upon the point. My noble and learned friend who is sitting with me in thinking that it is better to decide the other point, as we have the variance.

My Lords, the variance in my opinion is the proceeding. That variance is greater than this:—the record, of which a copy is in the Court of Error, stated that in a case where the plaintiff was now defendant was plaintiff, and the Court ordered, “that the sheriff pay the money therein into Court in five days, and that it be not a suit, but that an issue should be made between the claimant or assignees, when chose in action was the execution creditor defendant, dealing by issues. Then an order was made for the liability of the goods to be seised, and as to the title of the assignees, it was not an action upon promise, but a writ of error as to this matter. The writ of error is the only remedy in the Court of Exchequer Chamber had been entertained the cause for a moment of error, and it goes on in these proceedings as in the record and process, and a judgment in a plaintiff which was in

(it was a plaint no doubt arising upon execution) “between *William Henry King*, and *John Simmonds*, *William Ayscouch Wilkinson*, and *John Allsup*, survivors of *George Gibson*, assignees of *Emily Ann Birch*, a bankrupt, in an action on promises.” This is the description of the proceeding given in the writ of error. But when you look at the record it is not an action on promises, or any thing like it, but is a feigned issue,—an action on a wager. That of itself appears to me to be perfectly sufficient to dispose of this question, as indeed Lord Chief Justice *Tindal* held in the latter part of his very able judgment. For after dealing with the first question upon the feigned issue, and coming to the opinion that a writ of error does not lie under the Interpleader Act, he says, “besides there is a variance in this particular instance; here the writ of error is to examine the errors in an alleged judgment in an action between the parties; the record produced is not a judgment in an action, and consequently, as the Court has no power by its commission to decide whether there is any error or not, the proper course is to annul or quash the writ as having nothing to operate upon, as being idle and useless.”

Now, my Lords, I think, and so does my noble and learned friend the Lord Chancellor (who is not now present, but who has written to me to state his concurrence in my opinion) that we should give judgment for the defendants in error upon the whole case. Of course we shall not specify in the judgment the grounds of it; the judgment therefore is for the defendants in error. At the same time I must say for myself that I entirely agree with the Court of Queen’s Bench upon the merits of the case originally, which never were argued in the Court of Error; and that I entirely agree with the Court of Exchequer Chamber, upon the fullest consideration of this Interpleader Act, upon the point of the feigned issue; and therefore it must be taken as a judgment upon the whole case. Judgment affirmed, with costs.

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1847. THOMAS, LORD CAMOYS, and ELIZABETH } *Appel*  
 June 28 & 29. TEMPEST, (a) Widow - - - }  
 1848. THOMAS WELD BLUNDELL and Others - *Respon*  
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*Will.*  
*Misnomer.*  
*Description.*  
*Construction.*

A TESTATOR devised his estates on trust for "the second son *ward Weld, of Lulworth*," for life, with remainders to be taken successively in tail male, with like remainders to the third and other sons (except the eldest) of the said *Edward Weld*, a son; with remainders to the first and other sons and other brother (except the eldest brother) of the said *Edward Weld* successively in tail male; with like remainders to the third and other sons (except the eldest) of *Lady Stourton*, and the sisters of the said *Edward Weld*."

There was not, at the date of the will or death of the testator, any such person as *Edward Weld of Lulworth*, but it appeared from evidence as to the state of the *Weld* family that *Joseph Weld* was the then possessor of *Lulworth*, that he had an eldest son living, that *Lady Stourton* was one of his sisters, and that he had an eldest son, named *Edward Joseph*, commonly called *Edward*, and a second son, named *Thomas*, both unmarried. HELD, that the descriptions of the unnamed devisee, taken in the whole context of the will, and with the evidence of the state of the *Weld* family, clearly designated the second son, *Joseph Weld*, and that he was entitled as tenant for possession to the devised estates.

THE question in this case arose upon the construction of the will of *Charles Robert Blundell*, dated the 2nd of November, 1834, by which he devised his freehold and other estates to *John Gladstone* and others "upon trust to permit and suffer the second son of *Edward Weld*."

(a) Mrs. *Tempest* died before the appeal was heard; and the case was revived in the name of her real and personal representative.

*Lulworth*, in the county of *Dorset*, esq., to occupy and enjoy the same during his life, &c., and from and after his decease, then upon trust for the first and every other son of the said second son of the said *Edward Weld* severally, successively, and in remainder, &c., and the heirs male of their respective bodies; and for default of such issue, upon trust for the third and every other son and sons (except the eldest) of the said *Edward Weld* severally, successively, and in remainder, &c., and for the male issue of each such son in tail male, but in as strict settlement on each such son and his respective issue as the rules of law and equity will allow; and for default of such issue, upon trust for the first and every other son of each brother (except the *eldest brother*) of the said *Edward Weld* severally, successively, and in remainder, &c., and for the male issue of each such son in tail male, &c.; and for default of such issue, upon trust for the second and every other son and sons (except the eldest) of Lady *Stourton*, the wife of the Right Honourable *William*, Lord *Stourton*, and one of the sisters of the said *Edward Weld*, severally, successively, and in remainder, &c.; and for default of such issue, upon trust for the first and other son and sons of all the other sisters of the said *Edward Weld* severally, successively, and in remainder, &c., and for the male issue of each such son in tail male; and for default of such issue, upon trust for the first and other son and sons of the eldest and every other daughter and daughters in succession of the said *Edward Weld*, &c., and for the male issue of each such son, &c.; and for default of such issue, upon trust for *Henry Mostyn*," &c.

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The testator died in *October* 1837, leaving the appellants his co-heirs-at-law, Mrs. *Tempest* being his sister, and Lord *Camoy*s the eldest son of his other sister, deceased.

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There was no person known "as *Edward Weld Lulworth*," at the date of the will, or death of the testator. The state of the *Weld* family was this: *Thomas Weld*, of *Lulworth Castle*, who died in the year 1796, had nine sons and six daughters. The second of sons, named *Edward*, died in 1796, unmarried; and *Liam* and *Francis*, the fifth and youngest, also died in their father's life time. The six sons who survived him were, *Thomas*, the eldest, *Joseph*, who on *Edward*'s death, became the second, *John*, the third, and *Henry*, *James* and *George*. *John* was a Catholic priest, and died in 1816. Of the six daughters, the eldest, the second and the sixth, became nuns; the third married *William Lord Stourton*; the fourth married Mr. *Bodenham*; the fifth, Mr. *Vaughan*, and each of these three had issue. On the death of the father, in 1810, his eldest son, *Thomas*, became possessor of *Lulworth Castle*; and after the death of his wife, and marriage of his daughter, his only child, with Lord *Clifford*, became a Catholic priest, and, being created a Cardinal in the year 1822, by a previous family arrangement, made over *Lulworth Castle* and other estates to his then next brother *Joseph*, who from that time was the possessor of *Lulworth Castle*. *Joseph Weld* had three sons and two daughters; the eldest son, named in baptism *Edward Joseph*, was commonly called *Edward*; the second's name was *Thomas* and the third's *Joseph*. Those sons were living and unmarried at the date of the said will, and the eldest was personally known to the testator.

Soon after the testator's death, *Thomas*, the second son of *Joseph Weld*, assuming that he was the person designated by the descriptions in the will, as first devisee of the estate for life in the devised estates, took the name of *Blundell* in addition to his own, in compliance with the directions in the said will, and filed a bill in Chancery against the appellants, and the surviving trustees named in

will, and other persons, respondents, in the appeal. The bill stated, among other things hereinbefore stated, that the plaintiff was the second son of *Joseph Weld*, who was the only *Weld* of *Lulworth* at the date of the said will, and that the name of *Edward* was used by the testator by mistake for *Joseph*; that the object of the testator was to give his estate to the second son of the possessor of *Lulworth*, and to create a second *Weld* family, and with that view he expressly excluded the eldest brother of *Joseph Weld*, as also the eldest brother of the plaintiff (the respondent). The bill prayed that the said will might be established, and that the trusts thereof might be carried into execution.

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The appellants, in their answers to the bill, denied the competency of the testator to make a will, and denied that *Joseph Weld*, father of the respondent, was the person therein described as "*Edward Weld, of Lulworth,*" and that the name of *Edward* was used by mistake for *Joseph*; but they submitted that, if the devise had not altogether failed for uncertainty, *Edward Joseph*, the first son of *Joseph Weld*, must be taken to be the person in the will described as *Edward Weld* of *Lulworth*, he being at the date of the will of full age, and residing at *Lulworth*, and commonly called *Edward Weld* of *Lulworth*, and known to the testator by that name.

On an issue, *devisavit vel non*, tried at *Liverpool* in 1840, the will was established, and on the hearing of the cause in *March* 1841, the Vice Chancellor decided upon the words of the will, coupled with the evidence of the state of the *Weld* family at the date of the will, that the respondent was entitled as tenant for life in possession to the real estates thereby devised (a).

(a) 11 Simons, 467.



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The cause was twice reheard by Lord *Lyndhurst*, Chancellor—the second time, assisted by Justices *Patteson* and *Maule*. Two former wills, made by the testator, were received in evidence as exhibits, on the rehearing, the Lord Chancellor, concurring in the opinion of the Judges, affirmed the decree, but without costs (*a*).

The appeal against that decree came on to be heard in 1847, before Lord *Cottenham* (Chancellor), Lord *Lyndhurst*, and Lord *Campbell*, in the presence of eleven Judges of the Common Law Courts, viz. Baron *Parke*, and Barons *Alderson*, *Rolfe*, and *Mr. Justice Patteson*, and Justices *Coltman*, *Wightman*, *Cresswell*, *Erle*, and *Vaughan William*.

Sir *Fitzroy Kelly* and Mr. *Turner* (with whom was Mr. *Fleming*), for the appellants, contended that the name described in the will as “*Edward Weld, of Lulworth, in the County of Dorset, Esquire*,” applied to the eldest son of *Edward Weld*. He, although baptized by the name of *Edward Joseph*, was universally called *Edward*, and, according to the evidence, was introduced to the testator and known to him by that name only. He resided with his father at *Lulworth*, and might be truly called and described as *Edward Weld of Lulworth*. The words in the will being a sufficient legal description of *Edward*, the eldest son, *Edward Joseph Weld*, the devise could not be construed in favour of any other than his, *Edward's*, second son. Although he had no son at the date of the will, two sons have since been born to him, the second being born after the decree was pronounced (*b*). If he is, as the appellants

(*a*) 1 Phillips, 274; 12 Law Journ. N. S. 225.

(*b*) A discussion took place between the Lord Chancellor and counsel on both sides, whether this second son ought not to be a party to the cause, but no decision was given on the point.

mit, a person who, for the purposes of a devise of lands, sufficiently answers the description of "*Edward Weld*, of *Lulworth*," this devise to that person's second son cannot be construed a devise to the second son of another person of a different name, on the ground of mistake of name, or defect of description, shewn by extrinsic evidence; *Delmare v. Robello* (a), *Andrews v. Dobson* (b), *Standen v. Standen* (c), *Holmes v. Custance* (d), *Chambers v. Brailsford* (e), *Doe v. Chichester* (f), *Smith v. Campbell* (g), *Miller v. Travers* (h), Statute of Frauds (29 Car. 2, c. 2, s. 5), *Wigram on Extrinsic Evidence*, *passim*.

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It is not the name given in baptism, but that by which a person is generally known, that forms his legal description, as has been often decided on replications to pleas of abatement to declarations in actions at law and to indictments for misnomer; *Rastall's Entries* (i), *Sir Francis Gawdie's Case* (k), *Holman v. Walden* (l), *Bowen v. Shapcott* (m), *Weleker v. Le Pelletier* (n), *Lord Pitsligo's Case* (o).

The respondent is himself an illustration of this, for although baptized and confirmed by the name of *Thomas*, now, since he assumed the surname of *Blundell*, his Christian name is no longer *Thomas*, but *Thomas Weld*. There is no authority for saying that a person is not to take under a devise, unless the name by which he is described is his baptismal name.

It may be said here, as it was in the Court below,

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|------------------------------|----------------------------|
| (a) 3 Bro. C. C. 446; S. C., | (h) 8 Bing. 244.           |
| 1 Ves., jun. 412.            | (i) pp. 108, 384.          |
| (b) 1 Cox, 426.              | (k) Co. Litt. 3 a          |
| (c) 2 Ves., jun. 589.        | (l) 1 Salk. 6.             |
| (d) 12 Ves. 279.             | (m) 1 East, 542.           |
| (e) 18 Ves. 368.             | (n) 1 Campb. 479.          |
| (f) 4 Dow. 65.               | (o) 27 Lords' Journals for |
| (g) Cooper, 275 · 279.       | 1750, p. 486 a.            |

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that the further description in the devise to the said Lady *Stourton*, "one of the sisters of the said *Edward Weld*," cannot apply to this *Edward Weld*, as he is the brother but nephew of that lady. Is it not reasonable that the testator mistook the relation of parties than the name? It is assumed for the response that Lady *Stourton* is accurately described as "one of the sisters of the said *Edward Weld*," but contending that the name *Edward Weld* is a mistake altogether for *Joseph Weld*. There is evidence that the testator used and described *Joseph Weld* correctly on another occasion and there is no ground to assume he knew the facts of the family. But this at most is only an error in the description, which is rectified by the name, according to Lord *Bacon's* maxim, *veritas nominis tollit rem demonstrationis*.

To sustain the decree in this case, the name of *Edward Weld* must be struck out of the will, and the name *Joseph* inserted, and that upon parol evidence. There is no case, not even *Beaumont v. Fell* (a)—which relates to personal property—going to that extent, but the result in the cases of ambiguity of that sort is to declare the will void for uncertainty, and to these cases may be added that of *Doe v. Hiscocks* (b). The doctrine laid down in the judgment in that case, and in *Miller v. Travers* and other cases therein cited, are applicable to this case. They cited, among other cases on this point, *Hart v. Hort* (c), *Doe v. Westlake* (d), *Thomas v. Thomas*, *Daubeny v. Cochlan* (f), *Foster v. Walter* (g).

Mr. *Bethell*, Mr. *Hodgson*, and Mr. *Witham*, appeared for the respondent, *Thomas Weld Blundell*. His brother, *Edward Weld*, was not a party to the appeal.

(a) 2 P. Wms. 141.

(b) 5 Mee. & W. 363.

(c) 3 Bro. C. C. 211

(d) 4 Barn. & Ald. 57.

(e) 6 T. Rep. 671.

(f) 12 Sim. 507.

(g) Cro. Eliz. 106.

At the close of the argument for the appellants,—

The *Lord Chancellor* said, the learned Judges and the noble and learned Lords present, were all of opinion that it was not necessary to call on the counsel for the respondent. His Lordship then proposed this question to the Judges: “Whether, upon the true construction of the will of *Charles Robert Blundell*, dated 28th of November, 1834, regard being had to the proofs in the cause, *Thomas Weld Blundell* is entitled, as tenant for life in possession, to the real estates devised by such will to *John Gladstone*, *Robert Gladstone*, and *Thomas Robinson*, upon trust (except such as were specifically devised to any other person or persons, and all real estates held by him in trust), and entitled in reversion for his life to the houses and gardens by the said will devised to *William Hall* and *James Massam* respectively for the lives in the said will mentioned?”

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The learned Judges, with the leave of the House, retired to consider their answer, and on their return soon after,

Mr. Baron *Parke* read the question, and the unanimous opinion of the Judges as follows:—“We have considered this question proposed by your Lordships, and being all agreed upon the answer to be returned to it, and the reasons for that answer, we think it unnecessary to hear any further argument.

*Opinion of the  
 Judges.*

It appears to us, upon reading the will, and looking only at the evidence of the state of the *Weld* family at the time the testator made his will, and without advert- ing to the other parol evidence received in the Court of Chancery, and, as we think, rightly received, that the meaning of the words used by the testator to designate the devisee are clear; that the devise is not void for uncertainty, and that the respondent *Thomas Weld Blundell* is entitled to the estates mentioned in the ques- tion put by your Lordships.

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The question is, who is the person whom the description of "devisee in the will," applied to the properly fits?

In this case it is to be remarked, that he is described not by name, but by description only; neither christian nor his surname is mentioned, but he is described by his relation only to other individuals. The case, therefore, is not the same as if it had been a devise to *Edward Weld* himself, upon which supposed good deal of the argument at your Lordships' bar proceeded.

It may be conceded that, where a devisee is described by his christian and surname and some other distinctive circumstance, and no person answers both description and there is nothing in the rest of the will or the additional evidence to show who was meant, the name would prevail, and the descriptive circumstance would be rejected. But the maxim "*Veritas nominis tollit errorem descriptionis*" (a) is not inflexible, as has been explained by Lord Chief Justice *Gibbs* in the case of *Doe v. White* (b). For if it be clear, upon the due construction of the will with reference to the evidence of the facts of the family as known to the testator, that the meaning of the testator as expressed by the will was that the person described, and not the person named, was to take, the description will prevail over the name; for the will in question has no other object than to assist in discovering the meaning of the will, and is not applicable where it leads to a construction contrary to the expressed meaning of the testator.

Here, then, the question would be, supposing even there were a devise for a person by name, whether the construction and the evidence of the state of the family does not

(a) Bacou's Maxims, 25.

(b) 2 B. Moore 323

the description to prevail over the designation by name? We think the context, coupled with that evidence, clearly denotes that the name of "*Edward*" is a mistake.

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It may be admitted that the Christian name is not merely the name of baptism, but the name by which a person is commonly known, and that in this case the evidence shows that *Edward Joseph*, the eldest son of *Joseph*, was commonly known by the name of *Edward*, so as properly to be described and take by that name if the devise had been to him. Nor is it worth while to argue whether the description "of *Lulworth*" (though certainly more applicable, in ordinary parlance, to the possessor of the place) would not be applicable to him, though he only resided in *Lulworth*, and was not the possessor of the castle. Admitting that it did, and that, if there had been nothing more than a devise to *Edward Weld* of *Lulworth*, *Edward Joseph*, the eldest son, would have taken, we are of opinion that the other parts of the will, coupled with the evidence of the state of the family, do clearly point out that the devisee is the second son of *Joseph Weld*, the possessor of *Lulworth Castle*.

In the first place, the devise is clearly framed so as to show that the testator meant an existing person. The limitation to that son for life, with a devise over to his first and other sons in tail, is properly applicable to an existing person, as, if it were to one not *in esse*, the limitation over would be void. If it be said that the testator might not know the rule of law, the context shows that he did, for he provides in the next clause, which comprises future sons of *Edward Weld*, that the estate shall be in as strict settlement upon each son and his respective issue male as the rules of law or equity allow.

Secondly, on failure of the first taker, and the other

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branches of *Edward Weld's* family, the next remainder is limited to the other brothers of *Edward Weld*, except his eldest brother, and the will, therefore, describes *Edward Weld* as having an eldest brother.

Thirdly, *Edward Weld* is described as the brother of Lady *Stourton*.  
*Opinion of the Judges.*

Taking all these descriptions together, and looking at the will alone, we have this as the description of the named devisee; he is to be an existing person; the second son of an *Edward Weld*, and who certainly had an eldest brother, and was himself the brother of Lady *Stourton*.

Now, by the evidence, we have, at the time of the will made, *Thomas Weld* an existing person, the second son of a *Joseph Weld*, who had an eldest brother, and was the brother of Lady *Stourton*. And we have also a possible existing child, and a possible father for him in an *Edward Joseph Weld*, not having an eldest brother, but his eldest son, and having no sister Lady *Stourton* at all. There is no other possible person whom the testator could have meant, unless it be one of these two. At this, that the description of the person as being "*Lulworth*" is better adapted to one who is the possessor of that place, and not a mere resident there.

Under these circumstances, which was the person clearly meant by the description in the will? We entertain no doubt that *Thomas Weld* was that person.

It is to be observed that this construction is consistent with the obvious intention of the testator, that the remainder to the children of Lady *Stourton* should follow the remainders to the children of her brother, which would not be the case if the *Edward Weld* whose second son was to take, be her nephew, and not her brother.

We have to add, that the other extrinsic evidence

which we have not relied, does not, taken altogether, lead us in the least to doubt the propriety of the conclusion to which we have come from the will and the extrinsic evidence to which we have referred as the ground of our opinion.

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We, therefore, state our humble opinion to be, that the question proposed by your Lordships should be answered in the affirmative.

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The *Lord Chancellor*.—My Lords, it appears to me, after an attentive consideration of the facts of this case, and of the arguments that have been addressed to your Lordships in support of the appeal, that, looking to the unanimous opinion expressed by the learned Judges who attended the hearing of this case, your Lordships will concur with me that the conclusion, which those learned Judges arrived at, was a right one. I will not unnecessarily occupy the time of your Lordships by going in detail into the grounds of that opinion.

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There has scarcely ever been a case which has undergone such a careful examination as this. It was first argued before the Vice Chancellor of *England*, who expressed an opinion (*a*), which was afterwards brought under review by an appeal to the noble and learned Judge who then held the Great Seal. It was argued before him, and it being in his opinion a case in which it was advisable to have the assistance of some of the learned Judges, Mr. Justice *Patteson* and Mr. Justice *Maule* were accordingly called into the Court of Chancery, and the case was argued before them. They expressed an opinion, in which my noble and learned friend (Lord *Lyndhurst*), concurred (*b*) ; and one of the parties, not being satisfied

(*a*) 11 Sim. 485.

(*b*) 1 Phillips, 279.



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with that opinion, in due course, as he had a clear right to do, brought the case by way of appeal before your Lordships' House.

When the appeal came before this House, it had been heard by my noble friend, he thought it ought to be heard by and decided with the assistance of the learned Judges of the Courts of Common Law. It was quite obvious indeed that this House would not think it right to dispose of the case without having the attendant advice of the learned Judges. Accordingly they called in to your Lordships' assistance.

The case for the appellants was very ably argued in the presence of those learned Judges, and they came to a unanimous opinion in support of the judgment pronounced in the Court below; an opinion that met with the concurrence of all the noble and learned members of this House who attended that hearing. Under these circumstances and upon the further consideration of the case, I do clearly and distinctly concur in the conclusion to which those learned Judges came. I therefore submit to your Lordships that this House ought to pronounce a judgment affirming the decree of the Court below.

*Lord Brougham.*—My Lords, I was unable to attend the hearing of this case in your Lordships' House, as I was then engaged in the Judicial Committee of the Privy Council. At the request of my noble and learned friend (the Lord Chancellor), who attended the argument, I have examined the case with the best lights I have been able to command after reading the opinion of the learned Judges, and I certainly cannot entirely agree with it, when I look at the authority of other cases, particularly the case of *Huthwaite* in the Common Pleas (a), which is a remarkable case in many respects, and the case of *Tho*

(a) 2 B. Moore, 304.

*Thomas* in the King's Bench (*a*). Regard being had to those authorities, and to the circumstances of this case, I do not feel that I should be prepared, notwithstanding the profound respect I entertain for the opinions of those learned Judges, to coincide entirely in the opinion which they have expressed, and which opinion my noble and learned friend states also to be his.

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I do not propose to offer, by way of argument in support of my opinion, any lengthened view of those cases as they have struck me. But I think it would not be consistent with the respect I owe to your Lordships and to the opinions of those learned Judges, nor would it be consistent with the feelings I have for the parties themselves (for it was owing to my doubts that this case was not disposed of before, and indeed it was rather intended that the case should have undergone another argument by one counsel on a side), if I allowed this case to be disposed of without offering some observations upon it.

It has always been a nice point, where there has been an instrument of any sort, be it a gift, or settlement, or bequest (but particularly in case of a bequest), and where the result appears to depend on one of two things, which things affect the subject matter of the gift, settlement, or bequest, in so far as it is necessary to affirm who the person is to take—it has always been a matter of great nicety to ascertain in what way you are to steer between these two points, namely, where there is a name given and a description given, and where the name may be right and the description may not apply to the person, or where, on the other hand, the description may apply and the name may not answer—that has always been a question of great nicety, and has often become one of great difficulty. For

(a) 6 T. Rep. 671.

instance, take the case of a gift to A. B. the eldest son of C. D., and there exists an A. B. a second son of C. D., and there apparently the name is right. But if you take the second son of C. D., and consequently he must not be A. B. if he take at all, and he cannot take as the son of C. D., inasmuch as that *demonstratio personae* description, does not apply to him, he being the son of C. D. That is quite clear. You are then to choose between the two, and you are to satisfy yourself as a general rule in the best way you can, whether you will apply the one or the other of those tests to determine the meaning of the gift as regards the important point which shall take under it, namely, whether you will go by the description and not the name, or by the name and not the description, seeing that you must elect to abide by the one or the other. Properly speaking, independently of any rule laid down on the authority of text-writers (for example, the venerable authority of Lord *Bacon*): in decided cases, one should say the object must be determined at the meaning of the testator in the best way you can.

However, from the tendency of men to create rules in cases to which it is not very easy to apply rules (for each case must mainly depend on its own peculiar circumstances), there has grown up a principle which I believe Lord Bacon was the first person who promulgated. It is to be found in the law maxims, and is stated "*veritas nominis tollit errorem demonstrationis.*" Whether that is a very useful guide, and leads us to a conclusion in ascertaining who the party is, I will not now to inquire. I admit its authority as a general principle, but still, so far from being an inflexible rule, I find that learned Judges have held that it is not inflexible. That is the way in which it is put. No doubt it may really come to look at that maxim, "*veritas nominis tollit errorem demonstrationis,*" it cannot be a very

guide, or a strictly or absolutely inflexible rule, when you consider that the question always is, where the error lies, whether in the name, or in the illustration or description. You cannot exactly say that the truth of the name takes away the error of the description, because it may be that the name is wrong and the description right. Here the learned Judges have held that it is clear that the name is wrong, *Edward Weld*, the person named, not being meant, but another person of another name, *Joseph Weld*.

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The learned Judges say that there are several different tests by which you can ascertain that here the error lies in the name and not in the description; and the first circumstance which guides their opinion is, that it is evidently a limitation to an existing person. "In the first place," say the learned Judges, "the devise is clearly framed so as to show that the testator meant an existing person." Why? Because it is a "limitation to that son for life, with a devise over to his first and other sons in tail." That, say the learned Judges, as we all know, "is properly applicable to an existing person, because if it were to one not *in esse*, the limitation over would be void." "But it is very possible," it was said, "that the testator might not know the rule of law." Now, he might not know what learned Judges thought upon that subject, and he might not be aware of the import of a limitation over upon a devise in the first instance to a non-existing person. The learned Judges meet that by saying, "If it be said that the testator might not know the rule of law, the context shows that he did." Now I am not able to see how the context does show that; "For," they say, "he provides, in the next clause, which comprises future sons of *Edward Weld*, that the estate shall be in as strict settlement upon each son and his respective issue male as the rules of law or equity allow."

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It does appear to me that this is just saying he know anything about the rules of law or equity, he did not know how far any "strict settlement" each son and his issue male" could be made consistent with the rules of law or equity, that is to say those bounds which the rules of law and equity prescribe. Therefore I do not think, if it had rested upon a test, you could have at all said this was a dev person *in esse*, and not to a person *in posse*.

The learned Judges say, "Secondly, on failure of the first taker and the other branches of *Edward Weld* family, the next remainder is limited to the others of *Edward Weld*, except his eldest brother, the will therefore describes *Edward Weld* as his eldest brother." No doubt it does. Then the point is stated by the learned Judges to be that "*Edward Weld* is described as the brother of *Stourton*."

Upon these two grounds then we have it clear that there is this discrepancy between the name *Weld*, who is the person named, and the description that the description does not apply to *Edward Weld* but applies to another *Weld*, namely, one who is the brother of Lady *Stourton*, and who has an elder brother living. Therefore it does again come to this, that you have a clearly defined name, *Edward Weld*, to whom the description does not apply, and you have not the name of *Joseph Weld* to whom the description does apply.

Well then, my Lords, I will go back to the case of *Thomas v. Thomas* to which I have before referred. That was very like what I observed as to *Edward Weld*. The description there did not apply to *Mary Weld* as the description here does not apply to *Edward Weld* as *Joseph Weld* having an elder brother, and being

brother of Lady *Stourton*, not *Edward Weld*. In *Thomas v. Thomas* the words were "I devise to my grand-daughter, *Mary Thomas*, of *Llech-lloyd*, in *Merthyr* parish." It turned out, on enquiry, that there was a person of the name of *Mary Thomas*, but she did not reside in that parish, therefore she was not "*Mary Thomas*, of *Llech-lloyd*, in *Merthyr* parish," which was the demonstration or description, and she was the great-grand-daughter, whereas the gift was to the grand-daughter; "My grand-daughter, *Mary Thomas*." Therefore she failed in two particulars, just as in this case *Edward Weld* fails in two particulars. One was her not being the grand-daughter but the great-grand-daughter, and the other was her not residing in *Merthyr* parish. But it turned out by extrinsic evidence that there was a grand-daughter of the name of *Elinor Evans*, not *Mary Thomas*, who actually resided in the parish of *Merthyr*.

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Now, observe, my Lords, these cases so far are upon all fours, because, putting aside the one particular as to a devise to a non-existing person, for the reason I have given, and referring to the two particulars, which do not apply to *Edward*, but do apply to *Joseph*; there are also two particulars there in which the description did not apply to the person named, namely, *Mary Thomas*, *Mary Thomas* was named just as *Edward Weld* here is named. The two particulars of the demonstration or description, namely, the being the grand-daughter and residing in *Merthyr* parish, did not apply to the person named, *Mary Thomas*, just as the two particulars of having an elder brother, and being the brother of Lady *Stourton*, do not apply to the party named here, "*Edward*." So far they are alike. But there was another person, *Elinor Evans*, to whom the whole description did apply. She was the grand-daughter, not the great-grand-daughter, and she actually resided in *Merthyr* parish, so that there the des-

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cription applied, just as here the two particular not to the person named, but to another person not. Therefore so far the circumstances agree.

I ought to mention that this is the sole ground which I hold any difference; and as I am bound to the weight of authority against me, I give up that. These cases appear to me to be so perfectly alike that I do not see the possibility of distinguishing the one from the other.

Now, what was the result of the case of *Mary Thomas*? Not that the Court gave the estate to *Evans* because the description applied to *Elinor* and not to *Mary Thomas*. No such thing. The Court was involved in so much uncertainty that they did not disinherit the heir-at-law in consequence of the words used.

The other point, it is not necessary to mention, as to the propriety of admitting parol evidence.

One word as to the case of *Doe v. Huthwaite*. It occurred to me, at the time of *Doe v. Huthwaite* being mentioned, that it was a case which had very much been observed upon in Westminster Hall, and that when Chief Justice *Gibbs* said upon that case had also been much criticised in Westminster Hall. But this happened in *Doe v. Huthwaite*. It was an ejectment originally, and there was a special case for the opinion of the Court, and the parties not being satisfied with the opinion of the Court, it was turned into a special verdict. Thereafter it was carried into the Court of King's Bench (a), where it was disposed of thus: A new trial was ordered for the purpose of having the opinion of another jury upon the question, whether there was sufficient ground, in

(a) 3 Barn. & Ald. 632.

abide by the conclusion which, in the result, the Court of Common Pleas had arrived at, that is to say, whether upon the whole the person was to take by the description, the demonstration, or by the nomination, the designation by name. That was one question. Then that was not the end of the case, because that judgment awarding a *venire de novo* was the subject of great comment, just as the decision in the Court of Common Pleas had been. And so little were the parties satisfied with the award of a *venire de novo*, that from the judgment of the King's Bench awarding a *venire de novo* there was a writ of error brought. I forget whether it was a writ of error to this House, but my impression is that it was to this House, and not to the Exchequer Chamber; but upon that I have no very distinct recollection. But, at all events, the result was that an arrangement was come to between the parties, as I understood, so that ultimately it was left in those very peculiar circumstances, for which reason it never did receive any final decision, and never came within your Lordships' jurisdiction, the compromise having put an end to it.

I have said that I do not feel sufficiently strong in my doubt to make any difference of opinion among your Lordships, when I find I stand alone; above all when I look at the unanimous opinion and joint authority of the learned Judges in the peculiar circumstances of the case; when I say peculiar circumstances, I mean that not only does their united opinion deserve the greatest attention, and would be and ought to be treated with the most profound respect by your Lordships, even if it had been obtained in the ordinary way; but this was not the first time it was before one of the members of this House and some of those learned persons, because my noble and learned friend (Lord *Lyndhurst*), swayed by the importance of the case, and the somewhat conflicting authorities upon

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the subject, took the step (certainly the proper step in such cases), of calling for the assistance of two learned Judges, Mr. Justice *Patteson* and Mr. *Maule*, who gave him their assistance, and, I understand, that they came to the same opinion below. (C) They coincided in opinion with the other learned Judges because both those learned Judges attended the case, and the judgment being unanimous they must have been of the same opinion that they came to below. There were these peculiar circumstances—

Lord *Lyndhurst*.—Mr. Justice *Patteson* read the dissenting opinion of the two learned Judges in the Court below.

Lord *Brougham*.—And of course we understand that they had not altered their opinion :—that it was confirmed than otherwise. Therefore the case of the description given of it, by my noble and learned friend on the woolsack, that it has undergone a more extensive discussion than most cases which came under your Lordships' consideration.

For these reasons I shall not oppose the unanimous judgment of your Lordships, but hope your Lordships will excuse me for taking this opportunity of speaking in justice to myself and to the parties, whose grounds are upon which I had doubts, and upon which I should have come to a very different conclusion, if my doubts had been less shaken than they have been by the opinion of the learned Judges, and the consideration of the authorities. I have also had an opportunity of considering the very learned argument of Mr. *Stirling Williams*, and others in the Court of King's Bench in *Thomas v. Thomas*, and the result of the whole is that I have not considered it necessary to oppose the motion of my learned friend on the Woolsack, it being with the object of considering that question intermediately that the delay took place.

Lord *Lyndhurst*.—I have already expressed

opinion(a), on the construction of this will, and I do not think it necessary to trouble your Lordships further upon the subject. But with reference to the argument of my noble and learned friend, and the authority he has cited of *Thomas v. Thomas*, I beg leave to call the attention of my noble and learned friend to a passage in the opinion of the learned Judges. "In this case," they say (b), "it is to be remarked that he is designated not by name, but by description only, neither his Christian nor his surname is mentioned; but he is described by his relation only to other individuals. The case therefore is not the same as if it had been a devise to *Edward Weld* himself, upon which supposition a good deal of the argument at your Lordships' bar has proceeded." So that it was a question of description, and one part of the description being inconsistent with the rest of the description, the question was, which part of that description, taking the whole together, ought to prevail. Upon that ground the Judges have decided, and upon that ground my opinion is in conformity with the opinion which they have expressed.

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Lord *Brougham*.—My noble and learned friend is quite right. It is not in the name of the devisee; the mistake is in the name of *Edward*, which is mentioned as part of the description. I recollect the name of *Edward* is given, not as the devisee, but as part of the description.

Lord *Lyndhurst*.—Yes; therefore the question was what part of the description ought to prevail. We were bound by the evidence as it appeared to us; and upon the evidence we were of opinion that the description, which is in conformity with the conclusion to which the learned Judges have come, ought to prevail, having no doubt of what the testator's intention was.

(a) 1 Phillips, 289.

(b) *Supra*, p. 786.

1848. Lord Campbell.—I think it right to say that I entirely  
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 Lord concur with my noble and learned friends. The case has  
 CAMOYS been so fully discussed that it is unnecessary to state the  
 v. grounds upon which the judgment below is supported.  
 BLUNDELL. I will merely say that, looking at the authorities, and at  
 the state of facts, upon which there can be no doubt  
 whatever upon the evidence, I have not the slightest  
 doubt as to the intention of the testator ; and that being  
 so, I think the reasoning of the learned Judges upon that,  
 concurring with the opinion of my noble and learned  
 friends, is entirely satisfactory.

The decree was then affirmed, with costs.

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 July 20, 24, } OFFICERS OF GLASGOW COLLEGE - } *Appellants.*  
 25, and 27.

THE ATTORNEY GENERAL (at the relation }  
 of LORD MEDWYN and JAMES ROBERT }  
 HOPE, Esq.) and the MASTER and FEL- } *Respondents.*  
 LOWS of BALIOL COLLEGE, OXFORD - }

*Charity.  
 Administra-  
 tion, cy près.  
 Proposed  
 alteration dis-  
 allowed.*

A TESTATOR, born in *Scotland*, and educated at *Glasgow* College, by his will, dated in 1677, when he was resident in *England*, where he died in 1679, gave the residue of his estate to trustees for the maintenance and education, at the University of *Oxford*, of scholars born and educated in *Scotland*, who should have spent a certain time as students at *Glasgow* College ; and he declared it to be his will that every such scholar, should upon his admission at *Oxford*, execute a bond conditioned for payment of 500*l.* to the college if he should not enter into holy orders, and if he should accept any spiritual promotion, benefice or other preferment in *England* or *Wales*, it being the testator's will that every such scholar should return to *Scotland*, there to be preferred and advanced as his capacity should deserve, but in no case to come back into *England*, nor to go into any other place, but only into *Scotland*, for his preferment.

*Glasgow* College was Presbyterian, while the testator was a student there; but Episcopalian at the dates of his will and of his

death; soon after which, Presbyterianism became by law the established form of church government in *Scotland*, and has so continued, the Protestant Episcopal Church being always tolerated, and recently recognised by law, but not endowed.

In 1693, a decree was made establishing this charity, and thereby it was declared that *Baliol* College should receive the testator's exhibitioners, according to the condition of his will; and directions were given as to the number of students, and their stipends, &c., but no scheme was directed. This decree was adopted by Lord *Hardwicke* in 1744, and a decree was then made directing a scheme for the administration of the charity, *cy près*, it being impossible to carry the testator's intentions strictly into effect. The scheme was confirmed by a decree of Lord *Henley*, in 1759, with certain variations as to increasing the number of exhibitioners, and their stipends. Under these decrees, students had been admitted for many years at *Baliol* College from *Glasgow* College, without regard to their destination for holy orders or their return to *Scotland*.

Upon an information, filed in 1845, at the relation of members of the Protestant Episcopal Church in *Scotland*, a decree was made directing the Master to inquire whether the scheme sanctioned by the former decrees, and according to which the charity had been administered, could be varied so as to make it more effectually conducive to the supply of the present Protestant Episcopal Church in *Scotland* with competent clergymen, being natives of *Scotland*, and educated at *Glasgow* and *Oxford*; and in making such inquiry, the Master was to have regard to the said will, and to the circumstance that at its date the established Church of *Scotland* was Episcopal, and is now Presbyterian:

Held, that the proposed inquiry contemplated a new scheme, inconsistent with that, under which the charity had been administered for more than a century as near to the testator's intentions as was practicable, and that the proposed alteration of it was not warranted by any alteration in the state of the law and Church in *Scotland*.

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THIS was an appeal against a decree of Vice-Chancellor *Knight Bruce*, directing inquiries before the master with

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a view to the remodelling of a scheme under which  
 rity had been long managed, and administering  
 conformably to the will of the founder, 2 *Collyer*  
*John Snell*, by his will, dated *December 1677*  
 lished in 1679, gave his manor and lands of *U*  
 the county of *Warwick*, to his wife and four of  
 sons therein named (whom he appointed his ex  
 their heirs and assigns, upon trust, after paymen  
 debts and legacies (including one of 50*l.* to th  
 church of *Uffeton*) and annuities charged thereon  
 vey and settle the residue upon five or more perso  
 as the Vice Chancellor of the University of *Oxf*  
 Provost of *Queen's* College, the Master of *Baliol*  
 and the President of *St. John's* College, in the sai  
 versity, for the time being, or any three of them  
 nominate, and their heirs ;

“Upon trust, that the profits and products ther  
 be employed and disposed of, for the mainten  
 education—in some College or Hall in that Univer  
 be appointed by the said Vice Chancellor, Provost,  
 and President, for the time being, or any three c  
 and in such proportion, and with such allowances  
 such manner, as they, or any three of them, sha  
 think fit, and appoint—of such and so many schola  
 and educated in *Scotland* ; who shall each of the  
 spent three years, and two at the least, at the Co  
*Glasgow*, in that kingdom, or one year there, and  
 the least in some other College in that kingdom ;  
 said Vice Chancellor, Provost, Master, and Preside  
 the time being, or any three of them, shall think  
 exceeding the number of twelve, nor being und  
 number of five, at any one time, unless the reven  
 profits of my estate, for the purposes aforesaid dev  
 the discreet and prudent management of my execut  
 trustees, shall increase to such a condition as m  
 an allowance competent to maintain a greater num

“And my further will and mind is, that every such scholar and scholars, upon each of their admission to such College or Hall as aforesaid, shall be bound and obliged by such security as the said Vice Chancellor, Provost, Master, and President, for the time being, or any three of them shall think fit, to some person or persons, to be by them, or any three of them thereunto appointed, that the said scholar and scholars shall respectively forfeit and pay to that College or Hall, whereof or wherein he or they shall be respectively admitted, the sum of 500*l.* a-piece, of lawful money of *England*, if he shall not enter into holy orders, and if he or they shall, at any time after such his or their entering and admission, take or accept of any spiritual promotion, benefice, or other preferment whatsoever within the kingdom of *England* or dominion of *Wales*, it being my will and desire that every such scholar so to be admitted, shall return into *Scotland*, there to be preferred or advanced, as his or their capacity and parts shall deserve, but in no case to come back into *England*, nor to go into any other place, but only into the kingdom of *Scotland* for his or their preferment. And my will also is, that none of the scholars to be elected and admitted as aforesaid, shall take any benefit of this my bequest, above the space of ten years, or eleven at the most; for after that time they are, and it is my express will and desire, that they shall and may be removed into *Scotland* as aforesaid.”

The testator gave directions for filling up the vacancies occasioned by the death or removal of the scholars, and that all such scholars should, before admittance, be recommended by the Principal of *Glasgow* College, the Professors of Divinity and other officers of that college, and each should come as probationer to such college or hall whereto he should be appointed, and should there continue at his own charge for six months, to give evidence of his behaviour, learning, and abilities before his

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admittance to the benefits of the bequest, and that within the six months he should be admitted or not, at the discretion of the persons appointed for that purpose. And to every such scholar he appointed 20*l.* for the first three years, and 30*l.* a-year and more at that time, if his estate would bear it.

The testator was a native of *Scotland*, and studied at the University of *Glasgow* in 1643, at which time the church of *Scotland* was Presbyterian. He was in *England* at the time of making and re-publishing his will, and of his death, at which periods the Church of *Scotland* was Episcopal. On an information filed by the Attorney General, at the relation of the then President and other heads of Colleges in the University of *Oxford*, mentioned in the will, against the testator's heiress-at-law — suggesting a pretence by her, that Episcopacy had ceased in *Scotland*, and the Presbyterian form of worship was established in its place, that the testator's intentions could not be carried into effect, the devise having become void, the estate reverted to the testator. By a decree was made by the Lords Commissioners establishing the will against the heiress-at-law, directing the usual accounts of the testator's personal estate, reserving, until the accounts should be taken, all directions touching the establishment of the charity (a).

The Master having made his report, the cause was heard thereon and for further directions before the Master Keeper *Somers* in 1693. By the decree then made it was ordered that the executors in trust should convey the estate to the six senior Fellows of *Baliol* College, and various directions were given to the latter in managing and letting the estate, clearing off debts and incumbrances, and applying the surplus rents

(a) *Attorney General v. Guise*, 2 Vern. 266.

establishing the charity (*a*), subject to such alteration and disposition as the Court should from time to time make, upon due application by any person concerned, for the better execution of the trust, and as near as could be to the testator's will and intentions. The manor of *Uffeton* and the lands devised therewith were, in pursuance of this decree, conveyed to the then six senior Fellows of *Baliol* College, upon the trusts thereby declared.

The charity was managed under a scheme settled by the said decree until the year 1738, when an information was filed in Chancery by the then Principal and Professors of *Glasgow* College against the Master and scholars of *Baliol* College and the then six senior Fellows thereof, the Vice Chancellor of the University of *Oxford*, and others, which, after stating that the relators were not parties to the former suit, that the decree therein made gave benefits to *Baliol* College not warranted by the will, and that the charity estate was improperly leased at an undervalue, prayed that accounts of the property and of its management might be taken, and that the said decree having been obtained by misrepresentation, and being detrimental to the charity, might be altered, and the said lease set aside, &c.

By the decree made in that cause by Lord *Hardwicke* in 1744 (*b*), the relators and the defendants were ordered to lay before the Master a scheme or schemes for the better establishment and regulation of the charity, as near to the will and intention of the testator as the alteration of circumstances since the making of the will would admit, and for the making of leases of the charity estates for the future.

Three schemes were laid before the Master, one by the relator, another by the defendants, the Master and schö-

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(*a*) The decree is set out in  
 2 Coll. 670.

(*b*) *Attorney General v. Baliol College*, 9 Mod. 407.





rental of the estates, and an account of his receipts and disbursements, and after payment of certain specified sums (*a*), he should pay the remainder of the rents to the Master and Scholars of *Baliol* College, to be applied by them for the education and maintenance of scholars, at 70*l.* a-year each to five of the ablest of them, and 65*l.* a-year to others, so far as such rents would extend; the surplus, if any, to be preserved for the benefit of the charity, &c., with liberty for any of the parties to apply to the Court for directions to have a nomination of exhibitioners when there should be sufficient fund for the purpose, such exhibitioners for the future to be allowed their exhibitions without deduction on account of absence, when leave of absence should be obtained from the Master of the said College. And it was ordered, that notice of any vacancy of the scholars should be given to *Glasgow* College, and if they should neglect to nominate to such vacancy within six months after notice thereof, the right to elect thereto was to be exercised according to the former decree, which was to be observed in all matters wherein it was not varied by this decree.

Various orders were subsequently from time to time made in the said cause (*The Attorney General v. Baliol College*) as the revenue of the charity increased. By one of them, dated in 1777, it was ordered that *Glasgow* College should be at liberty to send two more scholars (there being then six), qualified according to the establishment of the charity, to be exhibitioners in *Baliol* College at 70*l.* a-year for each, and that the exhibition of the then sixth scholar, who had only 65*l.*, should be raised to 70*l.* a-year. By another, dated 1795, it was ordered that two more scholars should be added, at exhibitions of 70*l.* a-year for each, and all exhibitioners thereafter to be elected should enjoy their exhibitions no longer

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(*a*) They are stated in 2 Coll. 672.

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than ten years, and that their places should become vacant by marriage or acceptance of any ecclesiastical preferment in *England* or *Wales*, or of any place or office in the army or navy; and any who should be rusticated should forfeit his proportion of exhibition money during the period of his rustication, to be distributed among the rest of the exhibitioners. By another order in 1810, it was among other things ordered, that the portions of each of the ten exhibitioners then in *Baliol* College, the foundation of this charity, should be increased from 70*l.* to 133*l.* 6*s.* 8*d.*; and this order repeated in 1795 as to the duration of the exhibitions, and the forfeiture of them by marriage or acceptance of ecclesiastical preferment, or place in the army or navy; and by another order, dated 1829, new trustees of the charity were appointed.

All these orders were made on the petitions of the petitioners in the cause of *The Attorney General v. Baliol College*, and under the several decrees and orders made in the former cause of *The Attorney General v. Baliol College*, the charity has been administered from the year 1693. There was no decree, nor order, requiring the exhibitioners to give any bond, or in any way to bind themselves to enter into holy orders, or to return to *Scotland*, as required by the founder's will.

The information, on which this appeal arose, was given in 1844—amended in 1845—at the relation of the respondents, the Honourable *John Hay Forbes*, commonly called Lord *Medwyn*, one of the Masters of the Court of Justice in *Scotland*, and *James Robert Hope*, of *Edinburgh's Inn*, Barrister—both members of the Protestant Episcopal Church of *Scotland*—against the appellants and against the Master and Fellows of *Baliol College*. The appellants are named respondents on the record, but are not other parties to the appeal. The information, after s

to the effect hereinbefore stated, alleged that the object of the founder of the charity, as expressed in or to be collected from his will, was to provide, by means thereof, a supply of clergymen educated at *Oxford*, and canonically ordained, and being in communion with the Church of *England*, to officiate in *Scotland*; and in so providing for the education of such clergymen at *Oxford*, where they would necessarily be brought up in the doctrine and discipline of the Church of *England*, he manifested an intention to promote the dissemination of such doctrine and discipline in *Scotland*, and to favour the predominance of those principles by which the Episcopal church there was distinguished from the Presbyterian. The information charged that at the respective dates of the decrees of 1693 and 1759, it was from the circumstances of the times and state of the law impossible fully to perform the trusts of the said will according to the intention of the testator, but that in consequence of the repeal of the act 19 G. 2, c. 38, and other acts—which imposed penalties on persons resorting to or officiating in Episcopal chapels in *Scotland*—by the acts 32 G. 3, c. 63, and 4 Vict., c. 33, the Protestant Episcopal Church of *Scotland*, which existed ever since the date of the will, was fully recognized by the State, and the will and intention of the testator were more capable of being effectuated than they were at the dates of the said decrees; and many persons in *Scotland* were educated for the ministry of the Episcopal church there, and would be candidates for exhibitions upon this charity, if it were applied for the purpose of their education.

The information prayed a reference to the Master to settle and approve of a scheme (without prejudice to the present exhibitioners) for the better management of the charity, and more effectual execution of the trust of the will as nearly in accordance with the testator's intentions as the alteration of circumstances since the date of the

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will, and the present state of the Protestant Church in *Scotland*, would permit, and for consequent directions.

The appellants in their answer (a) stated the changes in the established church of *Scotland*, insisted that the testator's primary intention was to promote the advancement of learning generally in *Scotland* his native country, especially in connection with Glasgow College, where he had been educated, and not to carry out any particular views of religious doctrine or discipline, notwithstanding that important differences existed between the doctrine and discipline of the Protestant Episcopal Church in *Scotland* and the doctrine and discipline of the church established there at the date of the testator's will; and that the decree and orders made in the case of *The Attorney General v. Guise* and *The Attorney General v. Baliol College* had settled in a final manner the general scheme for the administration of the charity, so as to exclude the alterations sought by the respondents.

Answers were also put in by the other defendants. The respondents submitted the information, viz., the Masters and Fellows of Glasgow College, to the effect that they were satisfied with the present administration of the charity, but desired to submit to the judgment of the Court; and by the testimony of the charity estates, stating that, except as to the management of the charity, they had no interest in the matter, and submitting that they were necessary parties.

The cause was heard, upon the pleadings and admissions, before Vice Chancellor *Knight Bruce*, in 1846, when his Honour made the decree now appealed from, whereby it was referred to the Master "to ascertain whether, consistently with the law of *Scotland*

(a) This answer, as well as the statements and charge of information, are largely set forth in 2 Coll. pp. 764—8

scheme, according to which—under the decree of 1759, and the subsequent orders of 1777, 1795, and 1810—the charity founded by the testator's will was administered could be modified or varied, so as to make such charity more effectually conducive to the supply of the Protestant Episcopal Church in *Scotland* with fit and competent clergymen, who, having been born in *Scotland*, and educated wholly or in part at *Glasgow* and *Oxford*, should exercise their clerical functions in *Scotland*; and if the Master should be of opinion in the affirmative, he was to approve of a scheme for such purpose. But the Master, in making such inquiry, and considering and approving of a scheme, if any, was to have regard to the said will, and to the circumstance that the established church of *Scotland* was, in 1677 and 1679, Episcopal, and was, at the date of this decree, Presbyterian; and the Master was to proceed on the basis of the said first-mentioned scheme, and not to depart therefrom to any unnecessary extent, and was not to approve of any scheme that should disturb or interfere with any exhibitioner who was then, or before or at the date of his report should be, an exhibitioner on the said foundation. And for the present, and until further order, it was ordered that the charity should be administered conformably to the decree of 1759, and the orders of 1777, 1795, and 1810. And the Court declared its opinion that the Principal, Professors, Regents, and officers of *Glasgow* College, in so administering the said charity, ought to have regard, as far as conveniently might be in the present state of the Protestant Episcopal Church in *Scotland*, to the circumstance that the testator was to be considered as having been a member of the established Church of *England*, or of the then established Church of *Scotland*, and therefore an episcopalian Protestant, and as having by the expression, 'holy orders,' meant holy orders by Episcopal ordination."

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The decree contain-  
 tion of books at the  
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would be right. There being no report of the arguments before Lord Keeper *Henley*, or of his judgment, the grounds of it must be collected from the decree itself (a), and from the judgment of Lord *Hardwicke* in pronouncing the decree of 1744 (b). It was always admitted that the terms "holy orders" in the will, meant orders by the ordination of a bishop, as in the Church of *England*; yet, in the scheme laid before the Master in 1758 by the Vice Chancellor of the University of *Oxford*, Provost of *Queen's*, President of *St. John's*, and Master of *Baliol*, for the regulation of the charity, though it was specially urged that every scholar on the foundation should conform to the doctrine and discipline of the Church of *England*, and enter into holy orders, the Lord Keeper, upon overruling their exceptions to the Master's report, must have decided that the exhibitioners were not obliged to enter into such orders, and the obligation prescribed by the will having never been enforced, must be considered as expressly dispensed with in that decree, and in all the subsequent orders down to 1810.

[The Lord *Chancellor*, and also Lord *Campbell*, asked if there was any objection taken to the Vice-Chancellor's jurisdiction to alter decrees made by Lords Chancellors and Lords Keepers.]

Every possible objection was taken. By section 22 of the act 5 *Vict.*, c. 5, which created the Vice-Chancellors' Courts, their jurisdiction was defined, and it was provided that no such Vice-Chancellor should have power or authority to discharge, reverse, or alter any decree or order made by any other Vice-Chancellor except his predecessor in office, nor any decree or order made by any Lord Chancellor, unless authorised by the Lord Chancellor.

[Lord *Campbell*.—Suppose that, after the decree of 1759, Presbyterian Church Government in *Scotland* was

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(a) *Supra*, p. 807.

(b) 9 Mod. p. 408, *et seq.*



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abolished by act of Parliament, and Episcopacy re-  
 would it not be necessary to alter the scheme?]

There might be a new scheme. Liberty was re-  
 in the former decrees for any party interested to ap-  
 the Court. In the existing state of the Church of  
*land*, the Court of Chancery or this House, if called  
 the first time to sanction a scheme for the adminis-  
 of this charity, could not sanction any practicable  
 more in accordance with the testator's intentions than  
 which was established by the decree of Lord *Northin*.  
 The inferences in favor of the Episcopal Church, c-  
 from the testator's use of the terms "holy orders," c-  
 ferment," and "preferred," and from his gift of 50*l.*  
 parish church of *Uffeton*, may be admitted; that was  
 the established Church; and it was the established C-  
 of *Scotland*, whether Episcopal or Presbyterian, the  
 testator had in his mind. He was of Catholic or Lat-  
 narian principles, and his main object was the prom-  
 of the cause of education and religion generally in *Scot-*  
 especially in *Glasgow* University. In his letter in-  
 presenting his polyglot bible to the university, he  
 mends that, the place of his education, for "religion,  
 any particular religion, but religion generally, " and  
 learning;" and the Principal to whom he wrote, and the  
 fessors at that time, were eminent Presbyterians, an-  
 was the national religion until the end of the year,  
 it was replaced by Episcopacy. But if the educat-  
 ministers for the Episcopal Church of *Scotland*, as c-  
 lished at the date of the will, was the object of his ch-  
 that object could not be effected now, as that Epi-  
 Church differed essentially in doctrine and constitution  
 the present Episcopal communion tolerated in *Scotla-*  
 that at the present time, whatever might have been d-  
 the date of the will, the testator's intention cannot bec-  
 into effect except by an approximation *cy prés*, a  
 done in the *Mico Charity* and *Belton's Charities*.

*Attorney General v. The Ironmongers' Company* (a),  
*Attorney General v. Earl of Stamford* (b).

In any view of this case, the Vice Chancellor's decree could not be sustained, and the proper order for the House to make, would be to order the information to be dismissed.

Mr. *L. Wigram* and Mr. *R. Palmer* for the respondents (the relators), submitted that the Vice-Chancellor's decree was not inconsistent with the former decrees for the administration of the charity. The object of his Honour was not to disturb them, but to carry them out, and to effectuate fully the will of the testator. In that sense, the scheme settled under the former decrees was varied and extended by the subsequent orders of 1795 and 1810, so that Lord *Northington's* decree in 1759, on which the appellants relied as final and conclusive, did not preclude the Court from interfering with the scheme of administration then established. In the *Attorney General v. Bovill* (c), Lord *Cottenham* said, "I cannot concur in the opinion that I am precluded by the decree of 1816 from doing any thing that may now be proper to be done for the regulation of this charity." The former decrees and orders approved of such schemes as were practicable at their respective dates ; new circumstances having since occurred, the Court was justified in interfering ; *Attorney General v. Scott* (d), *Moggridge v. Thackwell* (e), *Mills v. Farmer* (f).

It was suggested in the argument for the appellants, that the Vice-Chancellor had not, as Vice-Chancellor, jurisdiction, without authority from the Lord Chancellor, to alter the decrees and orders of Lord *Somers*, Lord *Hardwicke*, and Lord *Northington*. No effect should be given to that objection, as the only result would be the delay and

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(a) 2 Myl. & K. 576; 2 Beav. 313 (see p. 317); Craig & Phil. 208, and 10 Clark & F. 908. (b) 1 Phill. 737. (c) *Id.* 766. (d) 1 Ves., sen. 417. (e) 7 Ves. 36. (f) *Id.* 486-7.

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expence of sending the case back to the Vice-Chancellor with the Lord Chancellor's direction to rehear the

[The Lord *Chancellor* and Lord *Brougham* decree under appeal was the Lord Chancellor's signed by him, and they set no stress on the objection.]

The difficulties which formerly opposed themselves to the execution of this testator's intentions have now ceased to exist. Episcopacy was all but forbidden in *Scotland* 1693, as appeared from the case of *Greenshields* (who was prosecuted for preaching Episcopalianism). The occasion to the act of 10 *Anne*, c. 7, by which subsequent Acts, Episcopacy was fully recognised in *England*. There were ever since Episcopal students in *Glasgow* college, candidates for this charity.

[The Lord *Chancellor*.—Episcopacy was tolerated in *Scotland* in 1744, yet the decree, then made, directed the administration of this charity *cy pres*. Can that stand with the Vice-Chancellor's, which directs the contrary?]

The alterations in the law and other circumstances have occurred since Lord *Hardwicke's* decree, making it desirable to have a new scheme which would do justice to all parties without overturning that decree. Though if it were, that schemes be laid before the Master of the Rolls, from the report of the case of the *Attorney General v. Baliol College* (b), that Lord *Hardwicke* was aware of the act 10 *Anne*, c. 7, and other acts that had been passed for relieving Episcopacy in *Scotland*, but he noticed only the acts passed before Lord *Somers*. Both these decrees, from the state of the law in *England* and the necessity of the case, proceeded on the same principle. The decree of 1693, having left it open to the parties to apply, the application to Lord *Hardwicke* was in the terms of the reservation, and did not

(a) See 19 Lords' Jour. 240,

(b) 9 Mo

suggest any change in the regulation of the charity, and it would be a very unusual thing for the Judge himself, in his view of the will, to suggest an extension of the scheme.

The testator's principal object was not, as alleged by the appellants, to favor *Glasgow* College or promote learning in *Scotland*, but to prepare young men from that country to receive their religious education in the doctrines and discipline of the Church of *England*, to receive holy orders there, and then return to *Scotland* to perform clerical duties. Their return to *Scotland* was to be compulsory, through the machinery of bonds and penalties. The pupils were required to spend two or three years only in *Glasgow* or some other *Scotch* College, but they were to remain in an *Oxford* College ten years. There was no doubt that the testator's design was to supply the Protestant Episcopal Church in *Scotland* with native clergymen episcopally ordained, who should have, previously to ordination, received an English university education. These purposes were perfectly lawful at the date of the will (*a*); the temporary causes, arising from changes in the law (*b*), which prevented their execution at first, were gradually removed (*c*), and have now entirely ceased to exist (*d*). The Protestant Episcopal Church in *Scotland*, partly relieved from disabilities by the acts of 10 *Anne*, c. 7, and 32 *G. 3*, c. 63, has been fully recognized by the act of 3 & 4 *Vict.*, c. 33; it is the same Church which was by law established at the date of the will, and is now, as it was then, in full

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(*a*) See Acts (*Scotch*), Car. 2 (*Scotch*), 1689, sess. 1, cap. 3; 1662, Parl. 1, sess 2, cap. 1 and 1690, sess. 2, cap. 2, 5, 17, and 4; 1663, Parl 1, sess. 3 cap. 5; 27, and 1693, cap. 22. 1669, Parl. 2, sess. 1, cap. 1; (*c*) See act of Scotch Parl., 1672, Parl. 2, sess. 3, cap. 9; 1695, ses. 5, c. 27; and 2 Russ. and 1681, Parl. 3, cap. 6. Hist. of the Church of *Scotland*, *passim*.

(*b*) See acts of the Estates (*Scotland*), 1689, cap. 13, 18, 21, and 30; Acts of Parliament (*d*) See Skinner's Annals of *Scottish* Episcopacy, *passim*.

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communion with the Church of *England*, retaining the same principles of religious doctrine and discipline (e).

The decrees of 1693, by Lord *Somers*, and of 1759, by Lord *Northington*, were not intended, and did not profess to provide for the perpetual administration of the charity. The first was expressed to be made subject to alteration "upon the application of any person concerned, for the better and more effectual execution of the trust, as near as could be to the testator's will and intentions," a complete execution of them having been rendered impossible by the then recent changes in Church and laws. The power of alteration so given was not exhausted by the scheme of administration contained in Lord *Northington's* decree, and accordingly that scheme was varied most materially, and extended by the orders of 1795 and 1810. No provision has been made by any decree or order for making the charity subservient to the religious purposes intended by the testator. The omission must be attributed to the circumstance that at the respective dates of the decrees those purposes were incapable of being carried into effect consistently with law. The scheme, therefore, adopted under such circumstances, for administration of the charity ought not to be held final now when a complete fulfilment of the founder's will is perfectly consistent with the policy and letter of the law, and the alteration is properly asked by a new information, regularly filed in the name of the Attorney General. It must also be observed that the *Scotch* Episcopal Church, on whose behalf the information is filed, was not represented in the former suits relating to the charity, and it is not according to the practice of the Court to hold decrees or orders, settling a scheme for the administration of a cha-

(e) See Skinner's *Ann. passim*; Canons of *Scotch* Episcopal Church, 1 to 30 (1838); Lawson's *Hist. Scotch Episcopal Church* (1843) and stat. of University of *Oxford* (1768).

city, conclusively binding on parties who had no opportunity of opposing it, especially when the scheme is manifestly insufficient for effectuating the founder's intention in their favour.

Mr. *Russell* replied.

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The *Lord Chancellor*.—This case came before your Lordships upon an appeal from the Court of Chancery, respecting a gift under the will of *John Snell*, dated *December* 1677, by which certain property was disposed of for the purpose of educating certain young men, who were first to be educated at *Glasgow*, and from thence they were to go to *Baliol College*, in *Oxford*.

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The part of the will that raises the present question is in these words: “and my further will and mind is, that every such scholar and scholars, upon each of their admissions to such College or Hall as aforesaid, shall be bound and obliged to submit and conform to the doctrine and discipline of the Church of *England*, and to enter into holy orders as soon as he or they shall be respectively capable, by the Canons of the Church of *England*, and shall also be respectively bound and obliged by such security as the said Vice Chancellor, Provost, Master, and President, for the time being, or any three of them, shall think fit, to some person or persons to be by them, or any three of them, thereunto appointed, that the said scholar or scholars shall respectively forfeit and pay to that College or Hall, whereof or wherein he or they shall be respectively admitted, the sum of 100*l.* of lawful money of *England*, if he or they shall at any time after such his or their admission take or accept of any spiritual promotion, benefice, or other preferment whatsoever within the kingdom of *England* or dominion of *Wales*, it being my will and desire that every such scholar so to be

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admitted shall return into *Scotland*, and there be preferred and advanced as his or their capacity and parts shall deserve, but in no case to go back into *England*, nor to go into any other place, but only into the kingdom of *Scotland*, for his or their preferment."

Now, my Lords, it must be borne in mind, that at the time of the date of this will, Episcopacy was the form of church government in *Scotland*, and that Episcopacy is not now the form of church government in *Scotland*. I shall have occasion to refer to various proceedings which have at different intervals taken place upon the subject of this bequest, the result of all which, I think your Lordships will be of opinion, has been to establish this fact, that in consequence of Episcopacy ceasing to be the form of church government in *Scotland*, and the Presbyterian form of church government being substituted in its place, the provisions made by the testator in his will could not be carried into effect; and as they could not be carried into effect, it was necessary to come to some conclusion as to what was to be done with this property.

It was at one time contended that the direct object of the testator having failed, the gift itself had become void, and that it had become the property of the heir-at-law. That contention, however, was overruled by the judgment of the Court of Chancery (*a*). But still it was, in that case, as in all the subsequent proceedings, assumed as a fact, and as a necessary conclusion of the circumstances that had taken place, that the terms of the will could not be carried into effect, and that it was necessary therefore to come to some arrangement, or to some scheme, by which so much of the testator's intention as could be

(*a*) See *Attorney-General v. Guise*, 2 Vern. 266.

carried into effect should be enforced, leaving out that part, which, by the course of events, had become impossible.

The decree now under appeal takes a very different view of the consequences of what has taken place in *Scotland*. By the decree now appealed from, it is referred to the Master (a)" to inquire whether the scheme can be modified or varied so as to make such charity more effectually conducive to the supply of the Protestant Episcopal church in *Scotland* with fit and competent clergymen, who, having been born in *Scotland*, and educated wholly or in part at *Glasgow* and *Oxford*, shall exercise their clerical functions in *Scotland*; and if the said Master shall be of opinion in the affirmative, he is to approve of a scheme for such purpose. But the Master, in making such inquiry, and considering and approving of a scheme, if any, is to have regard to the said will, and to the circumstance that the established church of *Scotland* was in the years 1677 and 1679 Episcopal, and is now Presbyterian." And the Court declared its opinion, "that the Principal, Professors, Regents, and chief officers of *Glasgow* College, in so administering the said charity, ought to have regard, as far as conveniently may be, in the present state of the Protestant Episcopal church in *Scotland*, to the circumstance that the said testator is to be considered as having been, when he made and when he republished his said will, a member of the then established Church of *England*, or of the then established Church of *Scotland*, and therefore an Episcopalian Protestant, and as having by the expression, 'holy orders,' meant holy orders by Episcopal ordination."

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Now, my Lords, it is quite clear that, according to the present state of the law, it is possible and legal to apply



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any income for the better provision of the Protestant Episcopal church of *Scotland*. The master has by the received direction that he is to adopt a scheme, of which will be to employ the income arising from property in favour of the Protestant Episcopal Church of *Scotland*. The Court has declared that to be the scheme which it takes, and the master is directed to inquire what scheme can be arranged, which shall be more conducive to the supply of ministers to the Protestant Episcopal church in *Scotland*. The master, therefore, has no discretion at all upon the subject.

It was argued at the bar, that the effect of the decree was merely to refer it to the master to say what the present scheme is one that ought to be continued. The decree leaves no discretion in the master on that point, but gives him a rule by which he is to act; he is to approve of a scheme generally, but the decree gives the directions by which he is to be guided; it declares in the opinion of the Court, the master is only to select one of a scheme for the purpose of carrying the view of the Court into operation.

Before I refer to what has been decided in this case, a century and a half, I shall call your Lordships' attention to what would naturally be, according to the view of the case, the result of the testator's gift, coupled with the transactions that have taken place. At the time when he made his will, Episcopacy was the form of church government in *Scotland*, and (which is not immaterial) he was of that persuasion, and approved of that form of church government himself. It is quite obvious, therefore, that that being the rule of church government in *Scotland*, and certainly the rule of church government in *Oxford*, he very naturally provided means by which Scotchmen, after having commenced their education in *Scotland*, should finish their education in *Oxford*.

he says, by the terms of his will—in order to supply the church in *Scotland* with well educated ministers, and he directs that they should take holy orders. And I think there is no doubt that what he meant by holy orders was something that was consistent with the state of *Scotland* and the state of *England* at that time, and that by the expression, “holy orders,” he meant holy orders according to the understanding of the Episcopal form of church government. The young men were to take holy orders, and then they were to come “into *Scotland*, and there be preferred and advanced as his or their capacity and parts shall deserve, but in no case to come back into *England*, nor to go into any other place, but only into the kingdom of *Scotland* for his or their preferment.” His object, therefore, beyond all question, was to have young men educated who should be competent to carry on the duties of the clergy according to the then established form of church government in *Scotland*, and—whether receiving their ordination in *England* or *Scotland* is quite immaterial—they were to have ordination according to the forms of the Episcopal church, and having received them, they were to come into *Scotland*, and there to seek their preferment—being prohibited from obtaining their preferment elsewhere, they were to go back into *Scotland*. And, consequently, it was his object to supply *Scotland* with able and well educated ministers, who were there to derive the benefit of the establishment as it then existed.

This was the state of *Scotland* at the time the will was made; and that form of church government having ceased to be the form of church government in *Scotland*, and the Presbyterian form of church government having been substituted in its place, the testator’s heir-at-law said, “Here is a gift intended [for the benefit of a charity, but which

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cannot now be carried into effect, and therefore perty would devolve upon me as heir-at-law" (

Now, although it does not appear upon the face of *Somers's* decree that the doctrine of *cy près* was before him, yet it must have been discussed and it appears to me to have been so discussed in the report in *Vernon*; because the whole question upon whether there was a failure of the object of the trust, so that the heir-at-law would come in; and it was within the province of a Court of Equity to administer the trust upon the principle of *cy près*, is not contended by anybody or thought of, that in the circumstances, as they then existed, the trust could be carried into effect according to the terms of the gift. Lord Stowell's opinion that the heir-at-law was not entitled, was not declared. But there is no declaration as to the scheme by which the trust should afterwards be carried into effect, though it appears from the report in *Vernon* that the matter was discussed, and that the principle of application of the trust *cy près* was that which was intended for by those who objected to the title of

That decree, no doubt, was not a decree which would have carried into the present form of the Court, would have been pronounced. It left the matter much too vague; and it was obvious, that according to our present form of procedure, it having been decided that it was clear that the trust could not be carried into effect according to the terms used in the will, and yet that the heir-at-law was not entitled, the Court would take measures for the purpose of ascertaining in what way it ought to be administered for the benefit of those to whom the income ought to be applied. That was not, however, done by that decree, and it came again before the Court in the year 17

(a) 2 Vern. 266.

(b) 8 Mod. 407.

what had been omitted in the decree of Lord *Somers*, was supplied by the decree of Lord *Hardwicke*; for there he declares that the master should approve of a scheme "for the better establishment and regulation of the charity, and carrying the same into effect for the future as near to the will and intention of the testator as the alteration of circumstances since the making of the will would admit." Assuming, therefore, that this alteration of circumstances did prevent the execution of the trust, according to the law as it was then in force, seeing that Lord *Somers* had decided against the heir, and that the trust was to be carried into operation, Lord *Hardwicke* adopted that course which was the most regular course, in my opinion, under the original decree of Lord *Somers* of referring it to the master to approve of a scheme.

Accordingly, my Lords, certain schemes were carried in before the master, and it is sufficient for the present purpose to call your Lordships' attention to what is stated in the master's report in the schedule thereto, containing an account of a scheme laid before him by the then Vice Chancellor and other officers of the University of *Oxford*. By the fifth of those exceptions, it was suggested "that every such scholar should be obliged to submit and conform to the doctrine and discipline of the church of *England*, and enter into holy orders, when capable thereof by the Canons of the church of *England*;" that was the proposition then made by the university of *Oxford*, raising directly the point. Perhaps it would be an answer to that, that the decree had disposed of it; that the decree, by directing the master to approve of a scheme *cy près*, had decided that the very scheme intended by the testator could not be carried into effect. However the parties were not excluded. If they were desirous of a more speedy termination of that point, no doubt the way to do it was, by bringing the proposition directly by way of exception before the Court. How did the Court deal with that?

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The parties came before Lord *Northington*. *Northington's* order was, "that the defend exception to the said report should be allow sum of 50*l.* therein mentioned, and all the s<sup>e</sup> ceptions were overruled."

Then, here we have the decision of Lord cluding the heir; we have the decree of Lord directing a scheme to operate *cy près*, and we sion directly upon the exceptions raised to t<sup>l</sup> Lord *Northington*, overruling those exceptions fore determining that it ought not to form scheme, that the scholars sent from *Glasgow* should be required to enter into holy orders. having been so decided, the Court, disapprovin schemes that had been suggested, gave some having overruled the exceptions, it was quite 1 to make any further declaration of the opin Court upon that subject, because it was distinc it was brought before the Court, and received rate judgment of the Court—that the scholars be required to enter into any such obligation.

The result of all that is, that, commencing wi *mers's* decree, which does not in terms decide th taking it up from Lord *Hardwicke's* decree of 17 ed by Lord *Northington's* in 1759, we find t century has elapsed since this charity had been be administered, not according to the terms of tor's will (that having become impossible), bu to a scheme omitting that part of the direction quired the scholars to enter into holy orders. become impossible, owing to the change of cir in *Scotland*, to comply with that direction, it Court to decide what was the best course to To direct the scholars to be educated accor Presbyterian form of church government woul

certainly that which the testator did not approve of, for he evidently looked to a totally different form of church government as that which he considered the scholars ought to be devoted to. To educate them in the Episcopal form of church government, was equally inconsistent with his intention, because then they could not take part in the established religion of *Scotland*, if they were no longer able to be sent to *Scotland*, there to be ordained, and after ordination, to obtain preferment there. There was, in fact, no preferment to be had in *Scotland* for those who were attached to the Episcopalian form of church government. His object, therefore, could neither be obtained by educating them according to the Episcopalian, nor according to the Presbyterian, form of church government, and the course which the Court therefore adopted obviously was, as neither by the one nor the other could the direct object of the testator be obtained, to leave the parties who were still to receive the benefit of a good education, to adopt the one or the other according as their own views of propriety dictated. It struck out that which had become impossible, and left that which was the purpose of the will, the education, still remaining open to the benefit of those young men who might go to *Glasgow* and come from *Glasgow* for the purpose of being educated at *Oxford*.

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My Lords, such was the decision of Lord *Somers*; I must assume that it was the opinion of Lord *Somers*; I know it was the opinion of Lord *Hardwicke* and Lord *Northington*, because we have in terms their decision upon the subject, and if there had been still more doubt than it appears to me there is, as to that being the proper course to be adopted under the circumstances that existed at the time those decrees were made, I should have thought that above a century of decision, not on a scheme which might or might not be a subject of variation, but

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upon the construction of the testator's will, connected with the change of circumstances which had taken place would have been sufficient to give a title to those then claiming the benefit of the charity in a given form, which ought not easily to be dispensed with.

We, however, have a decree before us, which in turn repudiates the provisions which were made by the former decrees, and which directs a course to be adopted, with the decrees of those very eminent Judges, by whom they were pronounced, hold to be practically inapplicable to the circumstances of the testator's will.

Now it is said (and it is the only ground on which it could be justified) that, although those decrees might be proper at the time when they were pronounced, yet, the circumstances have entirely altered, and there is no difficulty in carrying into effect the provisions contained in the testator's will. My Lords, I find no change of circumstances such as to lead to any such conclusion. At the time Lord *Hardwicke* pronounced his decree, and at the time Lord *Somers* and Lord *North* pronounced their opinions on the subject, the circumstances were exactly the same as now. There was a prohibition of persons following the Episcopalian form of church government in *Scotland*. There were certain rules and regulations prescribed from time to time in order to secure the loyalty of those persons, and they were taken from those who professed that form of worship. But that form of worship was not illegal. It was tolerated, in every sense, because the parties might follow that form of worship, without subjecting themselves to any penal consequence. But the ground on which the case was decided was, that it had ceased to be the established religion of the country. It had ceased to be the religion of the country in that form in which these young men could find occupation and preferment, and there

the Court said, "some other course must be adopted, and if we cannot carry into effect the whole of the testator's intention, we must carry it into effect so far as we can according to existing circumstances."

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Are not the circumstances the same now as then? Is not the Episcopal form of church government now confined to what are called dissenting interests in *Scotland*? Is not the Presbyterian form of church government still the established church government of *Scotland*? And whether the Episcopalians there have more or less tolerance than they had at a particular time, and whether they have been relieved from more or less of the difficulty that surrounded them at different periods, is quite immaterial, and falls short of the main point, the main point being, What is the established form of church government in *Scotland*? That which existed at the time those decrees were pronounced exists at the present moment. I think there was quite sufficient reason for what the Court did at those periods, and if the reason existed then, I think the reason ought to operate at the present moment as it did then, and that if the form of gift, which the testator intended, cannot be enjoyed in the shape and form in which we find it proposed by the testator's will, and the only mode in which it can be applied to the benefit of those parties intended to be benefited, is by that form which was presented by those decisions; nothing has taken place since those decisions were pronounced which would justify a Court of Equity in departing from them, and again resorting to an attempt to carry into effect the gift in the terms in which we find it prescribed by the testator.

My Lords, under these circumstances I submit to your Lordships that the decree of the Vice-Chancellor ought to be reversed, and I am not aware that there is anything else in the decree to prevent the dismissal of the suit.



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There is no other claim made ; the object of the information was to obtain that decision which was given by the Court below, and therefore that being the object (for the object of the information is that which has been so long decided, the decrees which remain at this day the same at the time they were pronounced) I submit the decree ought to be reversed, and that the information should be dismissed, with the costs in the Court below.

Lord *Brougham*.—I agree with my noble friend ; I never had any doubt, from the beginning to the end of this case, that what was wanting in the decree of Lord *Somers*, was supplied by the decree of Lord *Wickes* in 1744, and afterwards by that of Lord *Donnington*, which decrees were wholly inconsistent with the decree of Lord *Somers*, and proceeded upon a principle in every way inconsistent with the view taken in the decree of Lord *Somers*. It is clear that no difference whatever exists in the circumstances since those decrees were pronounced, to justify that contrary proceeding rather a contrary proceeding than a departure from the principle was done so many years ago. I will not go into the details as my noble and learned friend has gone into length. But I entirely agree with him, that the decree must be reversed, and that the information be dismissed, with costs.

Lord *Campbell*.—My Lords, I have no objection in saying that I should have very much lamented the decree of his honour the Vice Chancellor had it been in course it would be allowed to stand, if founded upon sufficient reason, but it certainly would, in my humble opinion, have much impaired the benefit of a most excellent charity. I find that the Chancellor and Professors of the College of *Glasgow* in answer, say that the scheme that has been so

on, is a “ highly convenient and beneficial scheme, and practically works extremely well, both as respects the patronage or right of nomination vested in these defendants, and the class and qualification of the scholars, out of whom the said exhibitioners are to be selected; and that it has given the utmost satisfaction, not only in the said College of *Glasgow*, and among the students thereof, by whom the said exhibitions are regarded as the highest and most honourable reward of merit, but also, as these defendants believe, to *Baliol* College aforesaid, where the studies of the said exhibitioners are carried on and completed. And these defendants further say, that the manner in which the said charity has been so as aforesaid conducted and administered in pursuance of the said scheme, has been very beneficial and of great advantage to the kingdom of *Scotland* generally, more especially because it has been the means of bringing forward and maintaining and educating at the University of *Oxford* many young men, natives of *Scotland*, who through their talents and attainments, and the advantages afforded them by the said charity, have in after life attained high distinction in different departments of literature and science, and have risen to stations of eminence both in the church and state.”

There can be no doubt that this representation is perfectly just, and that the beneficial effects which *Scotland* has derived from this charity would not have been derived to the same extent if it had been required that all who were to have the benefit of these exhibitions should enter into an engagement that they should take holy orders in the Episcopal church of *Scotland*, and should be confined to that church.

My Lords, Dr. *Adam Smith* was one of the exhibitioners, and I believe the high education he received at *Baliol* College laid the foundation of his great eminence in literature and philosophy. There has been a long succession of most distinguished men who have reflected

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honour upon the place where they were educated who have been of great service to their country, not only has that been the case where the exhibitions have continued to be laymen, but exhibitioners first at *Glasgow* and then at *Baliol College*, taken orders, have gained the greatest distinction in the church of *England*, and afterwards in the episcopal church of *Scotland*, and I feel that the church of *Scotland* would not, if its interests were properly considered, derive that benefit from the monopoly of this charity, which seems to be expended

But whatever the effect of the decree may be, we have to consider, is, whether it stands upon sound principles or not, and I entirely concur with my learned friends who have preceded me, that it should be reversed.

It is admitted by his honour the Vice-Chancellor that it was admitted by the learned counsel for the respondent, that the decrees of Lord *Somers*, Lord *Hardwicke* and Lord *Northington*, are to be taken to be right. Of course, we are not to suppose that the testator had considered that the Episcopalian Church cease to be the established Church of *Scotland*, there was to be no provision whatsoever for the episcopal church—we are not to suppose that if he had considered there was to be another form of religion established and that Episcopacy was to become a sect, in the only religion that was established in *Scotland* would have insisted as a condition, that all who were to take the benefit of his exhibitions should enter into a conclusive engagement to take orders exclusive of any other persuasion, when it was to be merely a religious charity wholly unendowed.

Then, my Lords, that being so, and these decrees being admitted to be right, what change of circumstances has there now that there should be an entire reversal

schemes, because the substance of the decree pronounced by his honour the Vice-Chancellor was this, that these exhibitioners should hereafter belong to the Episcopal church of *Scotland*, and to that alone, and that none should claim the benefit of this charity except such as were to be exclusively educated for the Episcopal church of *Scotland*? I cannot find any variation of circumstances at all to authorise such a change from the principle on which the charity is conducted.

What was the situation of the Episcopal church of *Scotland* in 1744, when Lord *Hardwicke* pronounced that decree? It was a persuasion that was tolerated, but not endowed. It was a church for which the state made no provision, there being at the same time another religious persuasion that was established and endowed by the state, and which was favourably regarded by the state. The first act of the sovereign of this country upon coming to the throne is to sign a declaration that the Presbyterian church of *Scotland* shall be maintained. That was the state of things when Lord *Hardwicke* pronounced his decree. What is the state of things now? The Episcopal religion is still only tolerated in *Scotland*; it is not the established religion of the country; there is no endowment made for it by the state, and therefore it remains exactly as it was. There have been some further indulgences; as the clergy in *Scotland* are no longer jacobites, as they do not object to take the oaths of allegiance, and do not hesitate to pray for the Royal Family, those cautions that were resorted to in former days to preserve the Royal Family on the throne, have ceased to be put in force now. Indeed there is a courtesy shown them; for the clergy who are ordained by *Scottish* Bishops, may, to a limited degree, be permitted to officiate in our churches in *England*. But that does not alter or affect the situation of the Episcopal church in *Scotland*. It is merely a persuasion that is tolerated, there being another religious establishment that is endowed. There is no change of

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circumstances, and there being no change of circumstances, and the decrees of Lord *Somers*, Lord *Hardwicke*, Lord *Northington* being allowed to be right, another decree which substantially overturns those decrees, is wrong.

I agree therefore in the motion that the decree be reversed, and the information be dismissed, with costs, as proposed.

Mr. *Russell* suggested that their Lordships' order should contain a direction that the costs of the appeal be paid out of the charity fund; for there was a large accumulation of surplus rents in the suit of the *Attorney General* v. *Baliol College*. The Court below might find it difficult in dealing with them—

The *Lord Chancellor*.—No order is necessary for that purpose; they are costs necessarily incurred in the execution of the trusts.

Mr. *Rolt*.—We understand that the information was dismissed, with costs against all the defendants. The fellows of *Baliol College*, having been made defendants, will therefore have costs.

Mr. *R. Palmer*.—Your Lordships understand that the Fellows of *Baliol College* have not appealed, nor do they appear on the appeal; which was brought by the principal and professors of *Glasgow College* alone. Your Lordships simply dismiss the information, with costs.

The *Lord Chancellor*.—We reverse the decree, and substitute for it the dismissal of the information, with costs.

[It was ordered, That the decree of the 24th of June 1846, be reversed, and that the information be dismissed, with costs, and that the cause be remitted back to the Court of Chancery to do therein as should be directed by the Court with this judgment.]

I N D E X.

ABANDONMENT. *See* **INSURANCE.**

ACCOUNTS.

Although a case against a railway company upon a contract, may consist of matters cognizable at law, yet, if there are complicated accounts between the company and other parties respectively, a Court of Equity is more competent than a Court of Law to take them, and to dispose of the whole case. Therefore, when *N.* and *S.* had become contractors with a railway, and *S.* became bankrupt, and the company refused to account with *N.* for the balance due, it was held that *N.* might file a bill against the company and *S.*'s assignees, for an account.—*The Taff Vale Railway Company v. Nixon*, 111.

ACCUMULATIONS.

Money was paid into Court to abide the result of a bill, and vested in stocks: Held, that the party declared entitled to the stock was entitled to the accumulations thereon.—*Barrett v. The Stockton and Darlington Railway Company*, 18.

AGREEMENT. *See* **BOND. VENDOR AND PURCHASER.**

1. The appellant having claimed to be a partner with one *Paynter* in gas works, which the latter had erected, and was about to sell to the *East London Gas Company* then about to be formed, it was agreed between them, for the purpose of ending their disputes respecting the ownership of the gas works, that *Paynter* should be at liberty to sell the works at such price as he pleased, upon accounting to the appellant for the value of the works at a certain rate, and that *Paynter* should hold shares for the appellant to the value of

2000*l.* for two years. The company having been formed and having purchased the gas works from *Paynter*, the appellant filed a bill against him, and obtained a decree for specific performance of their agreement. Before the decree was made, the company was dissolved, and the gas works were sold to the *Ratcliff Gas-light and Coke Company*. The appellant then filed a new bill against *Paynter*, the *Ratcliff Company*, the directors of the dissolved company and the assignees of *Paynter* (who had become bankrupt) to establish a lien upon the gas works for what should be found due to him under the former decree, as well to carry out the former decree against all these parties :—Held, by the House of Lords, affirming a decree of the Vice Chancellor, that the sale of the gas works by *Paynter* to the *East London Company*, was authorised by appellant's agreements; that he had no just claim against the company or lien on the property, and that the supplemental bill was properly dismissed with costs, as against all the defendants, except *Paynter*, and his assignees.—*Pinkus v. Ratcliff Gas-light and Coke Company, and others*, 309.

2. Stopping a suit in the Ecclesiastical Court for nullity of marriage, on the ground of impotency of the husband, is good and sufficient consideration to him for agreeing to articles of separation; and so is a covenant by a third party to pay the husband's debts.—*Wilson v. Wilson*, 538.

APPEAL.

An interdict, though in form *ad interim* only, must be treated as a final judgment, and may be the subject of appeal to this House.—*Fleming v. Newton*, 363.

APPORTIONMENT.

The Act 4 & 5 W. IV., c. 22, for the apportionment of rent annuities, and other periodical payments, extends to *Scotland*.—*Fordyce v. Bridges*, 1.

ASSIGNMENT. See NUN. PATENT. PLEADING, 12.

BANKRUPT.

A person who keeps a lodging-house, and supplies the lodge with food and wine, is a trader within the meaning of the bankrupt law.—*King v. Simmonds*, 754.

BILLS AND NOTES. *See* LIBEL.

The register of protests for non-acceptance and non-payment of bills of exchange and promissory notes, established by the *Scotch* acts of 1681 and 1696, and the 12 Geo. 3, c. 72, and 23 Geo. 3, c. 18, is a public document, to which every body has a right of access, and the publication of which, in a printed paper, does not constitute a libellous publication.—*Fleming v. Newton*, 363.

BOND.

1. A bond, void in law, may be enforced as an agreement in equity, subject to the effect of the equitable circumstances under which it was made.—*Squire v. Whitton*, 333.
2. An instrument purporting to be a bond, executed by the obligor, with blanks for the name of the obligee, and therefore void in law, is inoperative in equity as an agreement, there being no second contracting party.—*Id. Ib.*
3. A party joining as surety in a bond ought to be informed of the nature of the obligation, name of the obligee, and the relation in which he stands to the principal obligor.—*Id. Ib.*
4. *M.* induced *W.* to join him as surety in a bond for repayment of a loan, saying he only wanted time to realise securities, and he would hold her harmless. *M.* and *S.* being trustees of a fund, sold it, with consent of *B.*, the *cestui que trust*, and thereby raised the loan for *M.*, who informed *W.* that *B.* was the lender, but did not inform her how the loan was raised. Held, that *B.* not being in fact the lender, his personal representatives had no privity of contract with, or equities against *W.*, and that in consequence of the concealment from her of the real nature of the transaction, she was in equity altogether released from the bond.—*Id. Ib.*

CHANCERY. *See* ACCOUNTS. HUSBAND AND WIFE. JURISDICTION.

The *Attorney General* (after the passing of the statute 5 Vict., c. 5), filed an information in Chancery against the Mayor and Commonalty of *London*, alleging that the

Crown was seised of the bed and soil of the river *Thames*; that the defendants were conservators thereof, and in breach of their duty as such conservators, had granted to divers persons (also made defendants) licences to embank parts of the river, and had received fines for such licences, and that such embankments were nuisances; and the information prayed that the rights of the parties might be ascertained, that the licences might be declared void, and that injunctions might issue to prevent the completion of the embankments. The defendants denied that the embankments were nuisances, and demurred to the rest of the bill for want of equity: Held, affirming an order of the Master of the Rolls, that the information was maintainable in Chancery.—*The Mayor of London v. The Attorney General*, 440.

CHARITY. *See* WILL.

CONSIDERATION. *See* AGREEMENT.

CONSTRUCTIVE NOTICE. *See* VENDOR AND PURCHASER.

CONTRACT.

1. A letter offering a contract does not bind the party to whom it is addressed to return an answer by the very next post after its delivery, or to lose the benefit of the contract; an answer posted on the day of receiving the offer is sufficient.—*Dunlop v. Higgins*, 381.
2. A contract is accepted by the posting of a letter declaring its acceptance.—*Id. ib.*
3. A person putting into the post a letter, declaring his acceptance of a contract offered, has done all that is necessary for him to do, and is not answerable for casualties occurring at the Post Office.—*Id. ib.*
4. In an action for damages for breach of contract in the sale of goods, the measure of damages is not merely the amount of the difference between the contract price, and the price at which such goods could be bought at the moment when the contract was broken, but likewise a compensation for such profit as might have been made by the purchaser had the contract been duly performed.—*Id. ib.*

CONVEYANCES. *See* PLEADING, 12. *UNDUE INFLUENCE.*

COSTS. *See* PRACTICE.

1. After a judgment at law, finding payments made to a railway company to be overcharges, a bill filed pending a writ of error on that judgment, to restrain the company from continuing the overcharges, and for an account, &c., is not improper nor premature, and the plaintiffs are entitled to the costs.—*Barrett v. The Stockton and Darlington Railway*, 18.
2. The practice of allowing costs to be paid out of an estate may be, under certain circumstances, disregarded.—*Berry v. Morse*, 71.
3. Although the general rule is to make the party seeking a redemption pay the landlord's costs, the Court has jurisdiction to look to the landlord's conduct, and to throw the costs on him according to its discretion.—*Gerahty v. Malone*, 81.
4. In a case where the Crown would not be liable to costs, the judgment of the Court below, in favour of the Crown, was affirmed without costs.—*The Mayor of London v. The Attorney General*, 440.

CROWN. *See* JURISDICTION, 3.DAMAGES *See* CONTRACT, 4.

DIRECTION TO A JURY.

A patent was taken out for "a new and improved mode of manufacturing silk, cotton, linen and woollen fabrics." The specification, and a disclaimer subsequently filed under the stat. 5 & 6 Wm. IV., c. 83, set forth that the patentees claimed "the mode hereinbefore described, of producing or preparing stripes of silk, cotton, woollen or linen, or of a mixture of two or more of these materials, in such a manner that the weft or lateral fibres of both cut edges of each stripe are all brought up on one side, and into close contact with each other, and the reweaving of such stripes with the whole fur or pile uppermost, into the surfaces of carpets, &c." It appeared that one of these processes was old. The Judge directed the jury that if one was new, the patent could be supported for the combination of them, and would only be invalid

if there had been a public use of both before the date the patent: Held, that this direction was erroneous, and that the patent was void.—*Templeton v. Macfarlan* 595.

DIVORCE.

1. A petitioner for a divorce bill held excused for not having brought an action for damages against the adulterer upon the statement of the witnesses, that they did not find him until three years after the discovery of the adultery, and the petitioner was not able to pay the expenses of an action. A lapse of sixteen years from the adultery made no objection to the application for divorce at the end of that time.—*Martin's Divorce*, 79.
2. The wife's general bad conduct was admitted as an excuse for the husband's omitting to bring an action against the adulterer. A lapse of eight years from the discovery of the wife's adultery till the petition for divorce was presented, was held to be sufficiently accounted for by the husband's inability to bear the expenses of a divorce bill.—*Brook's Divorce*, 159.
3. The enforcement of the Standing Order of the House (No. 142), requiring the petitioner in a divorce bill to present himself for examination at the bar, may be dispensed with on account of the state of his health. The acceptance, by the petitioner in a divorce bill, of an offer of a certain sum upon a writ of inquiry to assess the damages, after judgment by default, in an action of *crim. con.* against the wife's paramour, held, under the circumstances, not to be a bar to the bill.—*Heneage's Divorce*, 496.

ECCLESIASTICAL COURT. *See JURISDICTION*, 4.

EJECTMENT. *See COSTS*, 3.

A lessee having been evicted for non-payment of rent under the ejectment statutes in *Ireland*, an equitable mortgagee of his interest filed a bill for redemption against the landlord. Held, 1st, that the mortgagee was entitled, under the earliest of these statutes (11 Anne, c. 2), to redeem the evicted premises; and, 2ndly, that trustees of a settle-

ment, to whom the lease had been assigned, were not necessary parties to the suit.—*Gerahty v. Malone*, 81.

ERROR.

1. A writ of error will not lie on a judgment on a feigned issue directed under the Interpleader Act.—*King v. Simmonds*, 754.
2. If a writ of error does not lie in a particular case, the Court of Error may properly—upon a rule obtained for that purpose—order the writ to be quashed.—*Id. ib.*
3. A writ of error, alleged error in the judgment in “an action on promises.” The transcript of the record shewed that the judgment was given, not in an action on promises, but on a feigned issue ; Held, that this was a fatal variance, and that the Court of Error was warranted in quashing the writ.—*Id. ib.*

ESTATE. See PERSONAL ESTATE.

EVIDENCE.

1. To render a person incompetent in the *Scotch* courts to be a witness, he must have a direct and immediate interest in the result of the suit in which he is called to give evidence, or he must be able to give the verdict in that suit in evidence in his own favour in another proceeding. An interest in the result of a suit, which is to render a person incompetent to be a witness, must be an interest of a substantial nature, and it must be the direct and necessary result of the suit. The law was the same in *England* and *Scotland* upon this point previous to the passing of the 6 & 7 Vict., c. 85.—*Willox v. Farrell*, 93.
2. A testator, who described himself as of “*Ashford Hall*, in the county of *Salop*,” devised “all my estate in *Shropshire*, called *Ashford Hall*,” to trustees for sale. Held, that a Court of Equity, in a suit to enforce the trusts of the will, might receive parol evidence to shew what the testator had been accustomed to consider the *Ashford Hall* estate.—*Ricketts v. Turquand and others*, 473.
3. The illegitimacy of a child, born of a married woman, is established, beyond all dispute, by evidence of her living in adultery at the time when the child was begotten, and of

her husband then residing in another part of the kingdom, so as to make access impossible.—*Barony of Saye and Sele*, 507.

4. Where a patent of Peerage cannot be found, entries on the Journals of the House of Lords, shewing the limitations of the patent, may be referred to for that purpose; or an examined copy of the record of the patent will be received.—*Id. ib.*

5. There is no absolute presumption of law as to the continuance of life, nor any absolute presumption against a party doing an act, because the doing of it would make him guilty of an offence against the law. In every instance the circumstances of the case must be considered. *Lapsley v. Grierson*, 498.

EXCHEQUER IN EQUITY. See CHANCERY.

EXCISE.

The Act 6 & 7 W. IV., c. 38, s. 3, extends to prevent a person, who is already a publican, from obtaining a licence to carry on the business of a grocer on the same premises, as absolutely as it does to prevent a person, licensed as a grocer, from carrying on in the same premises the business of a publican.—*Mc Kenna v. Pape*, 6.

FEIGNED ISSUE.

A writ of error will not lie on a judgment on a feigned issue directed under the Interpleader Act.—*King v. Simmonds*, 754.

GUARANTIE.

A., by a trust settlement, gave to his son "a like sum of 5,000*l.* sterling, payable, &c., after my decease, from which provision shall be deducted any sum that I have already advanced, or may still advance for him, to enable him to carry on his business." *A.* entered into a guarantie for 2,000*l.* for the firm of which his son was a partner. *A.* was compelled to pay that sum, and the firm afterwards becoming bankrupt, he obtained from its assets a small dividend. Held, that this was an advance to the son, which came within the description of money advanced to the son to enable him to carry on his business,

and that the son could only claim the balance of the 5,000*l.*, after deducting the sum thus advanced.—*Berry v. Morse*, 71.

HUSBAND AND WIFE.

1. The Court of Chancery exercises only its ordinary jurisdiction in giving effect to articles of separation between husband and wife, so far as they regard an arrangement of property; and the Court, in decreeing specific performance of such articles, will not inquire into the cause of the separation.—*Wilson v. Wilson*, 538.
2. Stopping a suit in the Ecclesiastical Court for nullity of marriage, on the ground of impotency of the husband, is a good and sufficient consideration to him for articles of separation; and so is a covenant by a third party to pay the husband's debts.—*Id. ib.*

INFLUENCE. See *UNDUE INFLUENCE*.

INSURANCE.

1. A vessel is totally lost, within the meaning of a policy, when it becomes, as a ship, of no use or value to the owner, and is as much lost as if it had gone to the bottom of the sea, or had been broken to pieces, and the whole or great part of the fragments had reached the shore as wreck.—*Irving v. Manning*, 287.
2. A loss is to be considered as total where a prudent owner, if uninsured, would not have repaired.—*Id. ib.*
3. In a valued policy the agreed total value is conclusive.—*Id. Ib.*
5. A policy of insurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured by way of liquidated damages.—*Id. ib.*

A ship was insured in a policy, in which the value was stated at £17,500. The ship was injured by storms, was surveyed, and the repairs were estimated at £10,500. When repaired, the vessel would have been of the marketable value of £9,000. The assured abandoned, and claimed as for a total loss. The jury found that, under the circumstances existing in the case, a prudent owner, uninsured,

would not have repaired the vessel. Held, by the Lords, affirming the judgment of the Court below, that the assured could recover as for a total loss.—*Irving v. Manning*, 287.

6. A vessel, insured under a time policy from *August* 1841 to *August* 1842, encountered very severe weather in the *Indian* seas, and was compelled, in *May* 1842, to put into the *Mauritius*. The master wrote to the owners, telling them of the injuries which the vessel had received, of the necessity to make extensive repairs, of his intention to borrow the money on bottomry for that purpose, of the sum required, and of the impossibility of getting the money except on the undertaking to return direct to *England*, instead of proceeding to *Bombay*, as originally intended. He further stated, that on account of the very low state of freights in *India*, this would be better for their interests, which he said he consulted in every thing he did. The agents for *Lloyd's* at the *Mauritius*, who were employed by the captain to act for him, wrote letters to the same effect. These letters were received at intervals between *September* and *December* 1842, and in the latter month the owners wrote to the agents, expressing their surprise at the amount required, but saying at the same time, that they supposed what was done was the best that could be done under the unfortunate circumstances in which the ship was placed. The owners wrote to agents in *London*, apprising them of the expected arrival of the vessel, and directing them to do what was needful. The vessel did arrive on the 27th of *March*, and was at first taken possession of by the agents for the owners. On the 30th of *March*, the owners abandoned to the underwriters: Held, that under these circumstances, they were not entitled to recover as for a total loss; for, first, assuming notice of abandonment to be necessary in a case of constructive total loss, the notice here had not been given in time; and secondly, the conduct of the owners on the receipt of the letters amounted to an election to treat this as a partial loss, and they could not afterwards, on the arrival of the vessel, when they found that the cost of repairs much ex-

ceeded the market value of the vessel itself, convert this partial into a total loss.—*Fleming v. Smith*, 513.

7. Though the master may, by an ordinary rule of law, be considered, whenever the vessel is, by capture or other detentions and casualties, prevented from continuing the voyage, as the agent for all parties concerned, yet the owners even under such circumstances, may by their conduct make him their sole agent, so as to be bound by his acts.—*Id. ib.*

7. *Per Lord Campbell.*—Notice of abandonment is necessary in order to convert a constructive into an absolute total loss.—*Id. ib.*

The cases of *Cambridge v. Anderton*, and *Roux v. Salvador*, shew that where a ship, in consequence of the inability of the master to get it off the rocks where it has struck, has been actually sold, or where a cargo of a perishable nature has been so damaged by the sea that its substance is gone, and it can never reach the destined port in specie, the loss in each of such cases is actual, and not constructive total loss.—*Id. ib.*

Where a prudent owner, uninsured, would have sold, the case amounts to one of total loss.—*Id. ib.*

INDERDICT. *See* APPEAL. JURISDICTION. PRACTICE. WITNESS.

INTEREST. *See* PAYMENT INTO COURT.

INTERPLEADER. *See* ERROR.

ISSUE. *See* ERROR. PRACTICE 8.

JUDICIAL COMMITTEE. *See* PRIVY COUNCIL.

JURISDICTION.

1. *N.* and *S.* contracted with a railway Company, jointly and severally, to execute railway works according to specifications and prices contained in a former contract between *N.* and the Company. *S.* was to advance the money necessary for the execution of the works, and to receive from the Company all monies accruing due from them in respect of the works, and apply them in discharge of *N.*'s liabilities under his contracts. *S.* became a bankrupt at the completion of the works, and the Company, after paying him and his assignees part of the monies due from them, refused to account with *N.* for the

balance, whereupon he filed a bill for an account against them and S.'s assignees: Held, that although the case against the Company consisted of matters cognizable at law, yet, as there were complicated accounts between them and the other parties respectively, a Court of Equity was more competent to take them, and to dispose of the whole case, than a Court of Law, and the bill was sustained accordingly.—*The Tuff Vale Railway Company v. Nixon and others*, 111.

2. The *Attorney General* (after the passing of the statute 5 Vict., c. 6), filed an information in Chancery against the Mayor and Commonalty of *London*, alleging that the Crown was seised of the bed and soil of the river *Thames*; that the defendants were conservators thereof, and in breach of their duty as such conservators, had granted to divers persons (also made defendants), licenses to embank parts of the river, and had received fines for such licenses, and that such embankments were nuisances; and the information prayed that the rights of the parties might be ascertained, that the licences might be declared void, and that injunctions might issue to prevent the completion of the embankments. The defendants denied that the embankments were nuisances, and demurred to the rest of the bill for want of equity: Held, affirming an order of the Master of the Rolls, that the information was maintainable.—*The Mayor of London v. The Attorney General*, 440.
3. *Quære*, whether, when an act of Parliament transfers jurisdiction from one Court to another, or grants an extension of the jurisdiction of an existing Court, it is necessary, in order to make the act binding on the Crown, that the Crown should be named therein?—*Id. ib.*
4. A testator, by his will and codicils, gave *R. A.* large bequests, which he revoked by a final codicil, providing only a small weekly allowance for him during his life. The will and all the codicils having been admitted to probate, after litigation as to the last codicil in the Ecclesiastical Court, *R. A.* filed a bill in Chancery, alleging that the testator had executed the last codicil under

influence of the residuary legatee, and false representations made at her instance respecting *R. A's* character, and that he had not been permitted in the Ecclesiastical Court to take any objections to that codicil, except such as affected the validity of the whole instrument; the bill therefore prayed that the executors or residuary legatee might be declared trustee or trustees for *R. A.*: Held, on demurrer, that the Court of Chancery had no jurisdiction in the matter (*dissentientibus*, Lord *Cottenham*, Chancellor, and Lord *Langdale*, M. R.), and that the proper course would have been an appeal to the judicial committee of the Privy Council against the sentence of the Ecclesiastical Court.—*Allan v. Mc Pherson*, 191.

5. A person whose name was upon the register of protests for non-acceptance and non-payment of bills of exchange and promissory notes, established by the *Scotch* acts of 1681 and 1696, and the 12 Geo. 3, c. 72, and 23 Geo. 3, c. 18, applied to the Court of Session for an *interim* interdict to prevent, so far as his own name was concerned, the publication of a copy of the register. The Court decreed for the appellants: Held, by the Lords, reversing that decree, that the interdict ought not to have been granted, and also that the costs in the Court below should be given.—*Fleming v. Newton*, 363.
6. An interdict, though in form *ad interim* only, must be treated as a final judgment, and may be the subject of appeal to this House.—*Id. ib.*
7. It is the ordinary rule of a Court of Equity, in cases where an heir disputes the will, to grant an issue to try that question; but where he does not dispute it, but acts under it, merely denying that certain portions of the land pass under the description used in it, a Court of Equity has full jurisdiction to determine the question thus raised, without granting an issue, or may grant such issue at its discretion.—*Ricketts v. Turquand*, 473.
8. The Court of Chancery exercises only its ordinary jurisdiction in giving effect to articles of separation between husband and wife, so far as they regard an arrangement of

document, to which every body has a right of access, and the publication of which in a printed paper does not constitute a libellous publication.—*Fleming v. Newton*, 363.

2. A person whose name was upon the register, applied to the Court of Session for an interim interdict to prevent, so far as his own name was concerned, the publication of a copy of the register. The Court decreed for the application: Held, by the Lords, reversing that decree, that the interdict ought not to have been granted.—*Id. ib.*
3. Though defamatory matter may appear only to apply to a class of individuals, yet if the descriptions in such matter are capable of being, by *innuendo*, shewn to be directly applicable to any one individual of that class, an action may be maintained by such individual in respect of the publication of such matter.—*Le Fanu v. Malcomson*, 637.
4. In such a case the *innuendo* does not extend the sense of the defamatory matter, but merely points out the particular individual to whom matter, in itself defamatory, does in fact apply.—*Id. ib.*
5. Therefore, after verdict, a declaration which recited that the plaintiff was owner of a factory in *Ireland*, and charged that the defendant published of him and of the said factory a libel, imputing that “‘in some of the *Irish* factories’ (meaning thereby the plaintiff’s factory)” cruelties were practised, though there was no allegation otherwise connecting the libel with the plaintiff, was held good.—*Id. ib.*
6. *A.* and *B.* may join in an action for a libel containing imputations injurious to a trade carried on by them jointly as partners.—*Id. ib.*

LODGINGHOUSE-KEEPER. See **BANKRUPT.**

MARRIAGE. See **DIVORCE. HUSBAND AND WIFE. LEGITIMACY.**

1. *A.*, a Scotchman, married in *Scotland* and went abroad; his wife cohabited with *C.*, and had children by him. To make such children legitimate it was held necessary, for those who asserted their legitimacy, to prove either a legal origin of the cohabitation, or a change in the nature

of it after the death of *A.* had become known to all parties. The mere fact that *C.* and the woman continued to live together was not sufficient for that purpose. Under such circumstances the children were held illegitimate, though born after the date of *A.*'s death. *Lapsley v. Grierson*, 498.

2. *Quere*: *C.* and *B.* live together as man and wife, in the *bona fide* belief that *A.*, to whom *B.* had been lawfully married, was dead; in fact he was alive; will his subsequent death, during the continuance of their cohabitation confer on it, according to the law of *Scotland*, the character of a lawful marriage?—*Id. ib.*

MISNOMER. See **WILL**.

NOTICE. See **VENDOR AND PURCHASER**, 5.

NUN.

Quere, whether an assignment of property by a nun is valid.—*Fulham v. McCarthy*, 703.

PARTNERS. See **LIBEL**, 6.

PATENT.

1. A patent was taken out for "a new and improved mode of manufacturing silk, cotton, linen, and woollen fabrics. The specification, and a disclaimer, subsequently filed under the stat. 5 & 6 Wm. IV., c. 83, set forth that the patentees claimed "the mode hereinbefore described for producing or preparing stripes of silk, cotton, woollen, or linen, or of a mixture of two or more of these materials in such a manner that the weft or lateral fibres of both cut edges of each stripe are all brought up on one side and into close contact with each other, and the reweaving of such stripes with the whole fur or pile uppermost, into the surfaces of carpets, &c." It appeared that one of these processes was old. The Judge directed the jury that if one was new, the patent could be supported for the combination of them, and would only be invalid if there had been a public use of both before the date of the patent: Held, that this direction was erroneous, and that the patent was void.—*Templeton v. Macfarlane*, 591.
2. The assignees of letters patent may, under the first

- and fourth sections of the 5 & 6 W. IV., c. 83, lawfully obtain a renewal of such patents.—*Ledsam v. Russell*, 687.
3. The statute does not authorize the Judicial Committee of the Privy Council to impose terms as conditions on which patents are to be renewed. The authority of the committee is limited to reporting on matters as between the public and the party applying.—*Id. ib.*
 4. There is nothing in the statute to fetter the discretion of the Crown in the renewal, except the length of time for which that renewal is to be granted, and which must not exceed seven years.—*Id. ib.*
 5. An application for a renewal is “prosecuted with effect” within the terms of the statute, if the party applying obtains the report of the Judicial Committee of the Privy Council before the expiration of the original patent.—*Id. ib.*
 6. The Crown is not restricted as to the time within which it may act upon such report, and renewed letters patent are not void, because they are dated after the expiration of the original letters patent.—*Id. ib.*
 7. If the Judicial Committee should impose a condition on a party applying for the renewal of a patent, such party need not, in an action for the infringement of the patent, aver that such condition was complied with before the patent was renewed.—*Id. ib.*

PAYMENT INTO COURT.

Monies paid for the use of a railway company, under protest as overcharges, were afterwards paid into Court under an order made by consent, and vested in the public stocks, to abide final judgment in an action brought to try the legality of the charges, which the judgment declared to be illegal: Held, that the party who paid the monies was entitled to the stocks and dividends and accumulations thereof.—*Barrett v. The Stockton and Darlington Railway Company*, 18.

PEERAGE. See EVIDENCE. LEGITIMACY.

Where a patent of peerage cannot be found, entries on the Journals of the House of Lords, shewing the limitations

of the patent, may be referred to for that purpose ; or examined copy of the record of the patent will be received.—*The Barony of Saye and Sele*, 507.

PERSONAL ESTATE. See PLEADING, 16. WILL.

1. Under a bequest of real and personal estates, upon trust to receive the rents and profits, and to pay legacies and annuities, and vest the surplus rents, &c., for other purposes, the personal estate is the primary fund liable to the payments, there being no direction to discharge it, or sell the real estate so as to constitute a mixed fund. *Boughton v. Boughton*, 407.
2. A testator, after devising real estates to trustees to the use *J. D. P.* for life, remainder to his first and other sons tail male, and to several others, bequeathed real and personal chattels to the same trustees, to permit the said *J. D. P.* to receive the profits for his life : and from the decease to permit each of the several other persons, whom an estate for life in the real estates was before limited, as each of them should become seised of the said real estates under the aforesaid limitations, to receive the rents thereof for his and their life and lives respectively and from and after the decease of the last of the said tenants for life as should become seised in manner aforesaid, or if none of them should so become seised, then from the decease of the said *J. D. P.* upon trust to assign and convey the chattels to such persons as should then become seised of the said real estates under any of the limitations aforesaid : Held, that the chattels vested in an infant, grandson of *J. D.* who was tenant in tail of the real estate on *J. D.*'s death, and not in his eldest son, a prior tenant in tail who died in *J. D.*'s life time.—*Potts v. Potts*, 671.

PLEADING.

1. A lessee having been evicted for non-payment of rent under the ejectment statutes in *Ireland*, an equitable mortgage of his interest filed a bill for redemption against the landlord : Held, that trustees of a settlement, to whom

- lease had been assigned, were not necessary parties to the suit.—*Gerahy v. Malone*, 81.
2. To sustain a bill of review proceeding on facts discovered subsequent to the decree complained of, it must be shown that leave of the Court to file it was regularly obtained.—*Tomney v. White*, 160.
 3. To sustain a bill of review for error apparent on the decree complained of, it is not enough that it contains allegations that the decree is erroneous, but error must be shown on the face of it.—*Ib. id.*
 4. An information was filed by the *Attorney General* against the *Mayor and Commonalty*, in which it was alleged that the Crown was seised of the bed and soil of the river *Thames*; that the defendants were conservators thereof, and in breach of their duty as such conservators, had granted to divers persons (also made defendants) licences to embank parts of the river, and had received fines for such licences, and that such embankments were nuisances; and the information then prayed that the rights of the parties might be ascertained, that the licences might be declared void, and that injunctions might issue to prevent the completion of the embankments. The defendants denied that the embankments were nuisances, and demurred to the rest of the bill for want of equity: Held, affirming a decree of the Master of the Rolls, that upon these pleadings the information was maintainable.—*The Mayor of London v. the Attorney General*, 440.
 5. Where a purchaser seeks to be relieved against a purchase, on the ground of personal fraud by the vendor, but states no other ground for relief, and the alleged fraud is not proved, he is not entitled to relief on any other ground.—*Wilde v. Gibson*, 605.
 6. Though defamatory matter may appear to apply to a class of individuals, yet if the descriptions in such matter are capable of being by *innuendo* shewn to be directly applicable to any one individual of that class, an action may be maintained by such individual in respect of the publication of such matter.—*Le Fanu v. Malcomson*, 637.

7. In such a case the *innuendo* does not extend the sense of the defamatory matter, but merely points out the particular individual to whom matter, in itself defamatory, does in fact apply.—*Le Fanu v. Malcomson*, 637.
8. Therefore, after verdict, a declaration, which recited that the plaintiff was owner of a factory in *Ireland*, and charged that the defendants published of him and of the said factory a libel, imputing that “in some of the *Irish* factories (meaning thereby the plaintiffs’ factory),” cruelties were practised, though there was no allegation otherwise connecting the libel with the plaintiff, was held good.—*Id. ib.*
9. *A.* and *B.* may join in an action for a libel containing imputations injurious to a trade carried on jointly by them as partners.—*Id. ib.*
10. If, on an application for the renewal of a patent, the Judicial Committee should impose a condition on the party applying, such party need not, in an action for the infringement of the patent, aver that such condition was complied with before the patent was renewed.—*Ledsam v. Russell*, 687.
11. A writ of error alleged error in the judgment in “an action on promises.” The transcript of the record shewed that the judgment was given, not in an action of promises, but on a feigned issue: Held, that this was a fatal variance, and that the Court of Error was warranted in quashing the writ.—*King v. Simmonds*, 754.
12. Parties having adverse or inconsistent rights in the subject matter of a suit, cannot be joined as co-plaintiffs.—*Fulham v. M’Carthy*, 703.
13. Nor can a party who has no interest, be joined as a plaintiff with one who has.—*Id. ib.*
14. Therefore, where one of the next of kin of an intestate, after assigning her distributive share of his estate, is joined as co-plaintiff with the assignees in a bill against the administrator and the other next of kin, for an account and payment, there is a misjoinder of plaintiffs, of which the defendant may take advantage at any stage of the cause; and such misjoinder will, even on the hearing, be sufficient to occasion a dismissal of the bill.—*Id. ib.*

15. In a suit in which an assignor and the assignees of an equitable interest are made plaintiffs, an issue directed to try the validity of the deed of assignment is improper, as being an issue between co-plaintiffs, and not between them and the defendant.—*Fulham v. M'Carthy*, 703.
16. Where a bill was filed by an heir-at-law to impeach conveyances of real and personal estate, on the ground of fraud and undue influence, and want of consideration, but there were no parties to the bill to represent the personal estate comprised in the impeached conveyances, the absence of such parties to the bill was held to be a fatal defect.—*Farmer v. Farmer*, 724.

PORTIONS. *See* SETTLEMENT, 1. GUARANTIE, 1.

POST, LETTERS SENT BY. *See* CONTRACT.

1. A person putting into the post a letter, declaring his acceptance of a contract offered, has done all that is necessary for him to do, and is not answerable for casualties occurring at the Post Office.—*Dunlop v. Higgins*, 381.

POWER.

1. Husband and wife, by a post-nuptial settlement, conveyed part of the wife's estate to a trustee, to the use of her husband for life, remainder to their eldest son for life, &c., with an ultimate remainder in fee to the husband, and a power to him to lease, "for any time or term of years, or lives, and with or without covenants for renewal, and in case of the determination of all or any of the aforesaid lease or leases, to make new or other leases thereof in manner aforesaid, and with or without any fine or fines, as he should think fit." The husband was also empowered to raise, by sale or mortgage, any sum or sums of money not exceeding in the whole 20,000*l.*, or to charge the premises therewith for such uses as he should appoint, and to charge to any amount for younger children. The husband and wife afterwards executed three leases of parts of the estates comprised in the settlement, for terms of 999 years, upon which fines were taken. One of the leases contained a clause permitting the lessee to graff and burn the surface, and also a clause of surrender, and another

contained clauses making the lessee punishable for waste and permitting him to cut timber and to graff and burn the surface, and in this lease was included part of the wife's estate not comprised in the settlement. The latter lease, and another of prior date, were made subject to existing freehold leases. None of the leases was referred to in the power. The fines received on the making of these and other leases amounted to 10,208*l.*, and the husband subsequently raised 10,500*l.* by mortgage of the estate, subject to the leases: Held, that all the leases were valid at law, as being authorised by the power in the settlement, and consequently there was no ground of equity to impeach them. Regard is to be had to the objects of the settlement where the power is of doubtful construction; but no such consideration is to control powers expressed in clear terms according to their ordinary acceptation.—*Sheehy v. Lord Muskerry*, 576.

PRACTICE. See JURISDICTION, 1. PLEADING.

1. Adecree giving effect to allegations read from an answer not proved nor admitted, was varied in that respect, and an inquiry on the subject was directed before the Master.—*Barrett v. The Stockton and Darlington Railway Company*, 18.
2. After a judgment at law, finding payments made to a Railway Company to be overcharges, a bill filed pending a writ of error on that judgment, to restrain the Company from continuing the overcharges, and for an account, &c., is not improper nor premature, and the plaintiffs are entitled to the costs.—*Id. ib.*
3. Money was paid into Court to abide the result of such bill, and vested in stock: Held, that the party entitled to the stocks, was entitled to the accumulations thereon.—*Id. ib.*
4. An interdict to prevent the publication of what is alleged to be a libel, though in form *interim* only, must be treated as a final judgment, and may be the subject of appeal to this House; and, the grant of such interdict being an excess of jurisdiction, this House ordered the appellant to receive his costs in the Court below.—*Fleming v. Newton*, 363.

5. If a bill or information discloses, upon the facts stated in any part of it, ground for a decree in equity, it is maintainable.—*The Mayor, &c., of London v. The Attorney General*, 440.
6. A bill, which raises a legal question, may be so framed as not to be open to demurrer on that account, but, on the real nature of the question appearing at the hearing, a Court of Equity will refuse to interfere.—*Id. ib.*
7. Where the Crown would not be liable to costs, the judgment of the Court below, against the Crown, was affirmed without costs.—*Id. ib.*
8. It is the ordinary rule of a Court of Equity, in cases where an heir denies the will, to grant an issue to try that question; but where he does not deny it, but acts under it, merely denying that certain portions of the land pass under the description used in it, a Court of Equity has full jurisdiction to determine the question thus raised, without granting an issue, or may grant such issue at its discretion.—*Turquand v. Ricketts*, 472.
9. In such a case, parol evidence of what was considered, in the lifetime of the testator, to be the extent of the lands constituting the estate, is receivable.—*Id. ib.*
10. If a writ of error does not lie in a particular case, the Court of Error may properly—upon a rule obtained for that purpose—order the writ to be quashed.—*King v. Simmonds*, 754.

PRESUMPTION OF LAW. *See EVIDENCE.*

PRIVY COUNCIL.

1. The statute 5 & 6 W. 4, c. 83, does not authorise the Judicial Committee of the Privy Council to impose terms as conditions on which the patents are to be renewed. The authority of the Committee is limited to reporting on matters as between the public and the party applying.—*Ledsam v. Russell*, 687.
2. There is nothing in the statute to fetter the discretion of the Crown in the renewal, except the length of time for which that renewal is to be granted, and which must not exceed seven years.—*Id. ib.*

3. An application for a renewal is "prosecuted with effect" within the terms of the statute, if the party applying obtains the report of the Judicial Committee of the Privy Council before the expiration of the original patent.—*Ledsam v. Russell*, 687.
4. The Crown is not restricted as to the time within which it may act upon such report, and renewed letters patent are not void, because they are dated after the expiration of the original letters patent.—*Id. ib.*

RAILWAY. *See* JURISDICTION. PAYMENT INTO COURT. PRACTICE.

PURCHASER. *See* VENDOR AND PURCHASER.

REMOTENESS. *See* WILL.

SCOTLAND. *See* APPORTIONMENT. MARRIAGE.

The Act 4 & 5 W. IV., c. 22, for the equitable apportionment of rents, annuities, and other periodical payments, extends to *Scotland*.—*Fordyce v. Bridges*, 1.

SETTLEMENT.

1. The trusts of a term in a post-nuptial settlement of real estates were, after the decease of the husband and wife (the settlors), to raise 1,000*l.* for the portion of every daughter and younger son, to be paid to the sons at the age of twenty-one, and to the daughters at that age, or marriage, if such ages should be attained or marriages had after the decease of the survivor of the settlors, and not sooner: And if any younger son died, or became an eldest son or only son before twenty-one, or any daughter before that age unmarried, or before his or her portion became vested, the portions provided for such son so dying, &c., and such daughters so dying, &c., before his or her portion became payable as aforesaid, should survive and accrue to the survivors of such daughters and younger sons, to be equally divided between them, and paid when their original portions should become payable. Then followed a proviso for the issue of a younger son or daughter dying in the lifetime of the settlors, or after their death, before his or her portion became due and payable: and a trust, after the death of the settlors, for maintain-

ance of such sons and daughters, or their issue, entitled to portions as aforesaid, until his or her portion became payable, with *cesser* of the term on payment of the portions, or in case there should not be any younger children or issue of them living at the death of the survivor of the settlors. The settlors had seven children (besides an eldest son) four of whom died in the lifetime of their parents, under the age of twenty-one, and unmarried: Held, by the Lords, reversing a decree in Chancery, that the three survivors were entitled to have the portions of the four deceased children raised for them, in addition to their own.—*Evans v. Scott*, 43.

2. *A.*, by a trust settlement, gave to his son "a like sum 5,000*l.* sterling, payable, &c., after my decease, from which provision shall be deducted any sum that I have already advanced or may still advance for him to enable him to carry on his business." *A.* entered into a guarantie for 2,000*l.*, for the firm of which his son was a partner. *A.* was compelled to pay that sum, and the firm afterwards becoming bankrupt, he obtained from its assets a small dividend: Held, that this was an advance to the son which came within the description of money advanced to the son to enable him to carry on his business, and that the son could only claim the balance of the 5,000*l.*, after deducting the sum thus advanced.—*Berry v. Morse*, 71.
3. *Semble*, that an appointment, duly made, of a whole estate, to the uses of a marriage settlement, by a party thereto, who thereby also granted and released only a moiety of the estate to the same uses, passed the entirety of the estate.—*Farmer v. Farmer*, 724.

SPECIFIC PERFORMANCE.

The appellant having claimed to be a partner with one *Paynter*, in gas works, which the latter had erected, and was about to sell to a Company then about to be formed, it was agreed between them, for the purpose of ending their disputes respecting the ownership of the gas works, that *Paynter* should be at liberty to sell the works at such a price as he pleased, upon accounting to the appellant for

the value of the works at a certain rate, and that *Paynter* should hold shares for the appellant in the Company to the value of 2,000*l.* for two years. The Company (the *East London*) having been formed, and having purchased the gas works from *Paynter*, the appellant filed a bill against him, and obtained a decree for specific performance of the agreement. Before that decree was made, the Company was dissolved, and the gas works were sold to the *Ratcliff Gas Light Company*. The appellant then filed a new bill against *Paynter*, the *Ratcliff Company*, the directors of the dissolved Company, and the assignees of *Paynter*, who had become bankrupt, to establish a lien upon the gas works for what should be found due to him under the former decree, as well as to carry out the former decree against all these parties: Held, by the House of Lords, affirming a decree of the Vice Chancellor, that the sale of the gas works by *Paynter* to the *London Company* was authorised by the appellant's agreement; that he had no just claim against the Company or lien on the property, and that the supplemental bill was properly dismissed with costs, as against all the defendants, except *Paynter* and his assignees.—*Pinkus v. Ratcliff Gas Light and Coke Company, and others*, 309.

STATUTES, CONSTRUCTION OF.

- 4 & 5 W. 4, c. 22.—Apportionment, 1.
- 6 & 7 W. 4, c. 38.—Excise, 6.
- 11 Anne, c. 2. (*Irish*)—Ejectment, 81.
- 7 & 8 Vict., c. 85.—Evidence, 93.
- 1681 and 1696. (*Scotch*)—Bills and notes, 363.
- 12 G. 3, c. 72.—Bills and notes, 363.
- 23 G. 3, c. 18.—Bills and notes, 363.
- 5 Vict., c. 5.—Exchequer in Equity, 440.
- 5 & 6 W. 4, c. 83.—Patent, 687.
- 1 & 2 W. 4, c. 58.—Writ of error, 754.

The intention of the legislature must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute.—*Fordyce v. Bridges*, 1.

SURETY.

1. A party joining as surety in a bond ought to be informed of the nature of the obligation, the name of the obligee, and the relation in which he stands to the principal obligor.—*Squire v. Whitton*, 333.
2. *M.* induced *W.* to join him as surety in a bond for repayment of a loan, saying he only wanted time to realise securities, and he would hold her harmless. *M.* and *S.* being trustees of a fund, sold it, with consent of *B.*, the *cestui que trust*, and thereby raised the loan for *M.*, who informed *W.* that *B.* was the lender, but did not inform her how the loan was raised: Held, that *B.*, not being in fact the lender, his personal representatives had no privity of contract with, nor equities against *W.*, and that in consequence of the concealment from her of the real nature of the transaction, she was, in equity, altogether released from the bond.—*Id. ib.*

“SURVIVING.” See WILL.

“TAIL MALE,” CONSTRUCTION OF. See WILL.

TRUSTS. See WILL.

UNDUE INFLUENCE. See PLEADING, 12.

A bill by *A. F.*, as heiress-at-law of *J. J.* and *E. G.*, to set aside conveyances made by them to *W. F.*, of real and personal estates on the ground of fraud, undue influence, and want of consideration, alleged that *J. J.*, who was deaf and dumb all his life, was incapable of executing or understanding any deed, and that *E. J.* was seduced by *W. F.* and being subject to his authority, executed the deeds without professional advice and for insufficient consideration, consisting only of a bond of *W. F.* for securing the price. There was not sufficient evidence of *J. J.*'s incapacity, nor did the deeds executed by him convey any property descendible to his heirs. The allegations of the seduction of *E. J.*, and of improper influence over her, were not sustained by the evidence, although there was some evidence of an illicit connexion between her and *W. F.*; it appeared also that *A. F.* had the benefit of the bond given to *E. J.*, and had long acquiesced in

and admitted the validity of the transactions: Held, that the bill was properly dismissed for want of sufficient proof of the charges as alleged, such as would justify the Court in setting aside concluded transactions.—*Farmer v. Farmer*, 726.

VENDOR AND PURCHASER.

1. A bill filed by a purchaser to set aside a purchase and conveyance of an estate, on the ground of fraudulent concealment of a right of way, dismissed with costs, there being no proof of concealment by the vendor, although the dealings were inconsistent with any right of way.—*Wilde v. Gibson*, 605.
2. To set aside a purchase, perfected by conveyance and payment of the purchase money, for fraudulent concealment of a defect in the title to the estate, where there was no warranty or statement that there was no defect, proof of concealment by the vendor's agent is not sufficient, there must be proof of direct personal knowledge and concealment by the principal.—*Id. ib.*
3. A purchaser of an estate, having made no inquiry respecting the title from an agent for the sale, is not entitled to any relief for any act of non-communication by him.—*Id. ib.*
4. Constructive knowledge of an agent, or knowledge acquired by him otherwise than as an agent for the sale, of a fact, the non-communication of which is made the ground for relief against the purchase, does not at all affect the contract.—*Id. ib.*
5. Constructive notice is resorted to from the necessity of finding a ground of preference between equities otherwise equal, but cannot be applied in support of a charge of direct personal fraud. Where a purchaser of an estate seeks to be relieved against the purchase on the ground of personal fraud by the vendor, and the alleged fraud is not proved, he is not entitled to relief on any other ground.—*Id. ib.*

WILL. See JURISDICTION. PRACTICE.

1. A testator, after various bequests, gave to his wife, for her

life only, all his remaining estates, and also gave her all his capital in trade, with three quarters of the profits arising therefrom, for her life; but nevertheless in trust, at her death, for his then surviving children, share and share alike, "independent of the rental of his said estate, which he gave and bequeathed to his surviving female children," to be paid to them as he directed. The testator then proceeded thus: "On the decease of any of these children, should they die without issue lawfully begotten, that share to fall to the rest, and so on to the last female child; but should they marry and have children, then their share to go to the said child or children, and from my last female child to the males of my body lawfully begotten, with the same restrictions as before expressed, and to the heirs and assigns of the last of them." One of the testator's daughters, after his death, married, and died in the lifetime of his widow, leaving children: Held, that such children did not take any interest under the will, the word "surviving" having reference to the death of the testator's widow, and not to his own.—*Wordsworth v. Wood*, 129.

2. In construing a will, the words "younger son," used by the testator in a proviso for the shifting, in certain events, of an estate thereby devised, are to be taken in their plain and ordinary sense, as meaning "younger in order of birth," unless it satisfactorily appears from other parts of the will that they were used by the testator in another sense.—*Wilbraham v. Scarisbrick*, 167.
3. A testator devised freehold estates to trustees, in trust to settle and convey them to the use of *G. R.* for life, with remainder to his issue in tail male, in strict settlement, and in default of such issue the estates to go over. *G. R.* had no son, but had several daughters, all born after the testator's death: Held, that the words, in "tail male," were descriptive, not of the issue, but of the interest they were to take, and that the daughters were entitled to take, under the limitation in remainder, as tenants in common.—*Trevor v. Trevor*, 239.

tors, &c. ; and as to the other moiety for the rest of his children, and their heirs, executors, &c., in equal proportions, and if but one child, both moieties for such child absolutely ; but if any or either of his said nephews' sons should die under their respective ages of twenty-five years, or having attained that age should afterwards die without leaving issue, the share or shares intended for the person or persons so dying should go to the others and other of the said nephews' sons ; and if all but one should die without leaving issue, the trustees should stand seised and possessed of the whole trust estate, in trust for such one surviving nephew's son for his life, and for his children and child as aforesaid ; but if all the testator's said nephews' sons should depart this life without leaving issue, then upon trust for such person as should at that time be the testator's heir. At the time of the testator's death, *A.* and *B.* had several sons living, and *B.* had another son born afterwards : Held, upon the construction of the will, that the trusts for accumulation and division of the property comprised all the sons of the nephews, who should be living when the first of them should attain twenty-five ; and as the son who should first attain that age might not be born until after the testator's death, the gifts were too remote, and therefore void : and the testator's real estates upon his death became vested in his heir : Held, secondly, that under a bequest of real and personal estates, upon trust to receive the rents and profits, and to pay legacies and annuities, and vest the surplus rents, &c., for other purposes, the personal estate is the primary fund liable to the payments, there being no direction to discharge it, or to sell the real estate so as to constitute a mixed fund.—*Boughton v. Boughton*, 406.

6. A testator, who described himself as of "*Ashford Hall*, in the county of *Salop*," devised "all my estate in *Shropshire*, called *Ashford Hall*," to trustees, for sale : Held, that this description was not confined to the mansion-house, properly so called, and the lands immediately adjoining, but extended to such other lands in *Shropshire*

as he possessed at the time of making his will.—*Ricketts v. Turquand*, 472.

7. Held also, that the Court of Equity, in a suit to enforce the trusts of the will, might receive parol evidence to shew what the testator had been accustomed to consider the *Ashford Hall Estate*.—*Id. ib.*
8. A testator after devising real estates to trustees, to the use of *J. D. P.* for life, remainder to his first and other sons in tail male, with like remainders to *J. T. D.* for life, and to her sons in tail male, and to several others, bequeathed real and personal chattels to the same trustees, to permit the said *J. D. P.* to receive the profits for his life; and from his decease to permit each of the several other persons to whom an estate for life in the real estates was before limited, as each of them should become seised of the said real estates under the aforesaid limitations, to receive the rents and profits thereof for his and their life and lives respectively; and from and after the decease of the last of the said tenants for life as should become seised in manner aforesaid, or if none of them should so become seised, *then* from the decease of the said *J. D. P.*, upon trust to assign and convey the chattels "to such person or persons as should *then* become seised of the said real estates under any of the limitations aforesaid." Held, that the chattels vested in an infant grandson of *J. D. P.*, who was tenant in tail of the real estates at *J. D. P.*'s death, and not in his eldest son, a prior tenant in tail, who died in *J. D. P.*'s lifetime.—*Potts v. Potts*, 671.
9. A testator devised his estates to the second son of *Edward Weld* of *Lulworth*, for life, with remainders to his sons successively in tail male, with like remainders to the third and other sons (except the eldest) of the said *Edward Weld*, and their sons; with remainders to the first and other sons of each brother (except the eldest brother) of the said *Edward Weld* successively in tail male; with like remainders to the second and other sons (except the eldest) of *Lady Stourton*, one of the sisters of the said *Edward Weld*. There was not, at the date

of the will or death of the testator, any such person as *Edward Weld* of *Lulworth*, but it appeared from evidence received as to the state of the *Weld* family, that *Joseph Weld* was then the possessor of *Lulworth*, that he had an eldest brother living, and had an eldest son, named *Edward Joseph*, and a second son, named *Thomas*, both unmarried; and that he was himself the brother of Lady *Stourton*: Held, that all the descriptions of the unnamed devisee, taken with the context of the will, and the evidence of the state of the *Weld* family, clearly designated *Thomas* the second son of *Joseph Weld*, and that he was entitled as tenant for life in possession to the devised estates.—*Lord Camoys v. Blundell*, 778.

10. A testator, born in *Scotland*, and educated at *Glasgow* College, by his will, dated in 1677, when he was resident in *England*, where he died in 1679, gave the residue of his estate to trustees for the maintenance and education, at the University of *Oxford*, of scholars born and educated in *Scotland*, who should have spent a certain time as students at *Glasgow* College; and he declared it to be his will that every such scholar, should upon his admission at *Oxford*, execute a bond conditioned for payment of 500*l.* to the college if he should not enter into holy orders, and if he should accept any spiritual promotion, benefice, or other preferment in *England* or *Wales*, it being the testator's will that every such scholar should return to *Scotland*, there to be preferred and advanced as his capacity should deserve, but in no case to come back into *England*, nor to go into any other place, but only into *Scotland*, for his preferment. *Glasgow* College was Presbyterian while the testator was a student there, but Episcopalian at the dates of his will and of his death; soon after which, Presbyterianism became by law the established form of church government in *Scotland*, and has so continued, the Protestant Episcopal Church being always tolerated, and recently recognised by law, but not endowed. In 1693, a decree was made establishing this charity, and thereby it was declared that *Balioi* College should receive

the testator's exhibitioners, according to the condition of his will; and directions were given as to the number of students, and their stipends, &c., but no scheme was directed. This decree was adopted by Lord *Hardwicke* in 1744, and a decree was then made directing a scheme for the administration of the charity *cy près*, it being impossible to carry the testator's intentions strictly into effect. The scheme was confirmed by a decree of Lord *Henley*, in 1759, with certain variations as to increasing the number of exhibitioners, and their stipends. Under these decrees, students had been admitted for many years at *Baliol* College from *Glasgow* College, without regard to their destination for holy orders or their return to *Scotland*. Upon an information, filed in 1845, at the relation of members of the Protestant Episcopal Church in *Scotland*, a decree was made directing the Master to inquire whether the scheme sanctioned by the former decrees, and according to which the charity had been administered, could be varied so as to make it more effectually conducive to the supply of the present Protestant Episcopal Church in *Scotland* with competent clergymen, being natives of *Scotland*, and educated at *Glasgow* and *Oxford*; and in making such inquiry, the Master was to have regard to the said will, and to the circumstance that at its date the established Church of *Scotland* was Episcopal, and is now Presbyterian: HELD, that the proposed inquiry contemplated a new scheme, inconsistent with that under which the charity had been administered for more than a century, as near to the testator's intentions as was practicable, and that the proposed alteration of it was not warranted by any alteration in the state of the law and Church in *Scotland*.—*Officers of Glasgow College v. The Attorney General*, 800.

WITNESS. See EVIDENCE.

WRIT OF ERROR. See ERROR.

"YOUNGER SON." See WILL.





